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No. _____

In The

# Supreme Court of the United States

F. LEE BAILEY,

*Petitioner,*

v.

THE FLORIDA BAR,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Florida**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the decision of the Supreme Court of Florida to disbar F. Lee Bailey deny him Due Process and Equal Protection by misinterpreting and misapplying established Florida law, failing to guarantee his right to call favorable fact witnesses whose availability was obstructed by agents of the federal government who had an adverse interest in the outcome of the case, refusing to consider the testimony and documentary evidence of those same witnesses in a parallel federal court of claims proceeding, where those witnesses substantially altered their prior testimony, by refusing to consider favorable polygraph evidence, admissible in other Bar cases, and by refusing to consider expert witness testimony, routinely received in other cases, relating to the ethical rules, practices and Bar policies regulating The Florida Bar?

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## OPINIONS BELOW

The Opinion of the Supreme Court of Florida is reported at 2001 WL 1472608 (Fla.), 26 Fla. L. Weekly S787, and is attached as Appendix A. The Amended Report of Referee is attached as Appendix B.

## JURISDICTION

The Supreme Court of Florida entered final judgment on November 21, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides that:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE[1]

The Petitioner, F. Lee Bailey, was an attorney licenced to practice law in the state of Florida until the Florida Supreme Court issued an opinion on November 21, 2001,[2] disbarring him. The circumstances leading to the disciplinary hearing of May-June, 2000, before a Referee, began in April 1994, when Petitioner was retained to be Florida counsel in the case of *United States v. Duboc*, 240 F.3d 1076 (11th Cir. Fla. 2000). (CFC Trial Tr. 42, LL. 17-19; Bar Hearing Tr. 749, L. 20 – 750, L. 20; 1996 Hearing Tr. 236, LL. 14-23). Subsequent to meeting with the Government's attorneys, Petitioner was convinced that a negotiated plea was in the best interests of his client, Claude Duboc. (Bar Hearing Tr. 755, LL. 10-22; 1996 Hearing Tr. 238, LL. 7-24). On April 19,1994, Petitioner, along with

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[1] The history of this litigation involves four judicial proceedings: On February 2nd and 3rd of 1996, there was a hearing on the Government's Emergency Motion to Surrender Property, before Judge Maurice Paul, ("1996 Hearing"); in May, 2000, there was a hearing before a Referee, brought by the Florida Bar against Petitioner in 1996, but which had languished for more than two years after Chief Judge Maurice M. Paul had refused to disclose to the Bar what he recalled – if anything – of a critical meeting with counsel on May 17, 1994. The Bar had applied for an emergency suspension of Petitioner's license in March, 1996, and was rejected by the Florida Supreme Court. The Bar trial before a Referee, was held in May, 2000; in July 2001, a trial was had in the United States Court of Federal Claims, wherein Petitioner sought to recover the value of the Biochem Pharma stock which he was forced to turn over to the Government through the coercion of 44 days imprisonment in 1996 ("CFC Trial"). The oral argument before the Supreme Court of Florida took place on August 30, 2001.

[2] Attached as Appendix A

then co-counsel Robert Shapiro, met with lawyers and a DEA agent of the United States, where discussions were had, *inter alia*, about attorneys' fees. Robert Shapiro broached the subject, querying whether a fee of one million dollars would be considered reasonable for each of the three defense attorneys. The response from the Government agents was in the affirmative. (CFC Trial Tr. 51, LL. 8-17; Bar Hearing Tr. 761, LL. 1-25; 1996 Hearing Tr. 242, LL. 3-7).

On April 25th and 26th, 1994, there were a series of meetings regarding a prospective plea agreement. On April 25, a list was created indicating Duboc's assets that *could* be subject to forfeiture, *if* he agreed to forfeiture. Included in this list were two assets in a bank account in United Bank of Switzerland, Luxembourg: approximately $ 3,500,000.00 in cash, and 602,000 shares of stock in a Canadian pharmaceutical company, Biochem Pharma. (CFC Trial Tr. 54, L. 11 – 56, L. 7; Bar Hearing Tr. 771, LL. 9-23; 1996 Hearing Tr. 243, L. 13 – 244, L. 18). On April 26, 1994 there were a series of four separate meetings dealing with the topic of attorneys' fees. This day, April 26, 1994, is critical to this entire case, and findings as to what occurred then were corrupted by the conduct of the Courts of Florida, as this Petition will explain.

The first meeting occurred when Assistant United States Attorney Greg Miller invited Petitioner into his office, where he indicated that he was very pleased with the way the case was progressing and wanted to protect the Petitioner as to his legal fees. To this end, AUSA Miller suggested a cash asset on the list that had been created by Petitioner and his client the day before, valued at about three and one-half million dollars, and suggested

that it should be exempted from forfeiture, and turned over to Petitioner to cover legal fees and expenses. Petitioner agreed.[3] (CFC Trial Tr. 63, L. 6 – 64, L. 25; Bar Hearing Tr. 775, L. 4 – 778, L. 21; 1996 Hearing Tr. 246, L. 5 – 247, L. 25).

The second meeting occurred immediately following the first, wherein Special Agent Carl Lilley of the Drug Enforcement Agency suggested that, due to the fact that Duboc believed that the value of the Biochem Pharma stock was anticipated to appreciate, and the further fact that the Government would have to liquidate the shares as soon as they were received, thus "dumping", and probably severely depressing their value, it would be a good idea for the Petitioner to take the stock in lieu of the cash account for fees and expenses. (CFC Trial Tr. 65, L. 66, L. 25; Bar Hearing Tr. 786, L. 9 – 791, L. 21; 1996 Hearing Tr. 248, L. 12 – 249, L. 15). AUSA Miller then requested to talk with Petitioner privately, in what was to be the third of four meetings dealing with the fee issue.

AUSA Miller told Petitioner that he was "gambling" by accepting the stock. He explained that if the value of the shares declined to the point where there would not be a sufficient *resource* from which to get his legal fees, Petitioner would be out of luck, because the Government would provide no other asset for that purpose. (CFC Trial Tr. 67, L. 2 – 69, L. 1; Bar Hearing Tr. 791, L. 22 – 796, L.

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[3] It should be noted that this "largesse" was not a major concession by the Government; the United States in 1994 had no cooperative treaty with Luxembourg, and thus no legal way to commandeer these assets.

17; 1996 Hearing Tr. 249, L. 18 – 252, L. 6). Petitioner elected to take this risk.

The fourth meeting occurred with First Assistant U.S. Attorney David McGee, where Petitioner was told that the Government could not "be seen" as setting defense attorney's fees, and that the *ultimate* approval, therefor would come from Chief Judge Maurice M. Paul. Mr. McGee further stated that such a course of action would not be a problem, as the Government would support Petitioner's application to the judge. (CFC Trial Tr. 74, L. 7 – 75, L. 3; Bar Hearing Tr. 800, L. 801, L. 2; 1996 Hearing Tr. 253, L. 15 – 254, L. 17).

Petitioner had, at the second meeting on April 26, 1994, supplied the number to his non-trust bank account (extant since 1992), in Credit Suisse Bank in Geneva, Switzerland to the Government lawyers, who then worked with Duboc to create and telefax a transfer document, which sent the cash to the DEA, and the Biochem Pharma shares to Petitioner's personal account in Geneva. The document contained no language of limitation and was thus, on its face, a transfer in fee simple. (CFC Trial Tr. 69, L. 2 – 71, L. 12; Bar Hearing Tr. 821, L. 3 – 822, L. 9; 1996 Hearing Tr. 256, L. 11 – 257, L. 22). These April 26, 1994 discussions were the last occasion that the stock – or legal fees – were discussed by and between Petitioner and the government until January 11, 1996, when there was a change of counsel hearing; lawyers for the government – for the first time– learned that the BioChem Pharma shares had substantially appreciated in value.

Then – for the first time – the government demanded that the stock be turned over to it, claiming – also for the

first time – that the stock had been given to Petitioner, "in trust." (CFC Trial Tr. 201, L. 8 – 202, L. 22; Bar Hearing Tr. 893, L. 4 – 903, L. 4). In February 1996, Judge Paul convened a series of hearings, where the Petitioner was ordered, *inter alia*, to return the stock to the Court; and later, the repayment of certain expenses (over $400,000.00), which the Court had "disallowed." Petitioner, being unable to completely comply with Judge Paul's initial orders in the time allowed, was jailed on contempt charges for 44 days. (Bar Hearing Tr. 940, L. 946, L. 13; 1996 Hearing).

A complaint was filed with the Florida Bar in March 1996, accusing Petitioner with various violations of the Rules Regulating the Florida Bar. The investigation remained stagnant for two years until a claim filed by Petitioner – *at the suggestion of the government*[4] – in the United States Court of Federal Claims, demanding that the value of his stock be returned to him, survived a motion to dismiss, and was ordered to trial.

In May-June 2000, a hearing was held on the disciplinary charges, in which Petitioner was denied access to critical testimony from Government lawyers[5], was denied

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[4] Petitioner had filed in the District Court to establish his property rights to the stock, or at least its increased value. The government responded by saying that such a claim belonged in the United States Court of Federal Claims. When Petitioner followed this suggestion, Judge Paul attempted – in a *sua sponte* order – to deny Petitioner access to any court in the United States, even though he clearly had no jurisdiction to do so.

[5] See letter to Assistant Attorney General Robinson, dated April 6, 2000, requesting permission to depose Mary Lee Warren, attached as Appendix E, and the letter from AUSA

a stay until such time as the Court of Federal Claims trial, which was substantially dealing with the same issues, (and wherein that critical testimony could be – and indeed was – compelled – could be concluded[6]), and was denied the admission of crucial, favorable expert testimony. Upon conclusion of the Disciplinary hearing, the Referee recommended that Petitioner be permanently disbarred from the practice of law in the state of Florida[7].

In July 2001, the Court of Federal Claims trial commenced. Here, much of the testimony denied the Petitioner in the Bar hearing was heard.[8] Additionally, much

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Petrie, dated June 23, 2000 (*after Petitioner's Bar trial was over)* denying permission to depose Mary Lee Warren, attached as Appendix F.

[6] See Emergency Motion for Abatement or Stay, dated May 24, 2000, attached as Appendix G, Supplement to Emergency Motion for Abatement or Stay, attached as Appendix H, and the Supreme Court of Florida's denial of Motions for Abatement or Stay, dated May 26, 2000, attached as Appendix I.

[7] See Amended Report of Referee, attached as Appendix B.

[8] AUSA Kirwin testified that, based upon the "recently recovered" notes that he had taken during the May 17, 1994, chambers conference before Judge Paul, which notes had not been "available" during the Florida Bar hearing, he does not recall the word "trust" being used. (Tr. 592, L. 20 – 594, L. 2); Justice Department lawyer Samuel testified at the Court of Federal Claims trial that AUSA Kirwin *never told her* that Petitioner was holding the stock in trust. (Tr. L. 17). Additionally, she testified that AUSA Kirwin told her that assets were going to be exempted from forfeiture. (Tr. 447, LL. 10-13). AUSA Samuel in her deposition taken *after the conclusion* of the Florida Bar hearing testified to the following: She learned in 1994 that the U.S. Attorney's Office was going to seek to exempt from forfeiture the Biochem Pharma stock (Tr. 14, LL. 9-13); that AUSA's McGee, Hankinson or Kirwin never told her the stock

of the testimony of those who appeared against the Petitioner at the Bar hearing, changed[9] to such an extent that, based upon the more recent testimony, the Referee could not have found, by clear and convincing evidence, against the Petitioner.

This evidence was offered to the Florida Supreme Court[10] in the form of a transcript of the Court of Federal

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was given in trust (Tr. 12, L. 8 – 13, L. 8); and that AUSA Kirwin told her that eight hundred thousand dollars of otherwise forfeitable property would be set aside to support the French properties (Tr. 41, LL. 11-22). Mary Lee Warren, who was the Deputy Assistant Attorney General, in a deposition that was taken after the Florida Bar hearing, maintained that she had no knowledge of any arrangements between Petitioner and the Government.

[9] Edward Shohat testified in the Court of Federal Claims trial that he did not recall whether AUSA Kirwin or anyone else, during the pre-plea conference in Judge Paul's chambers, ever used the word "trust." (Tr. 1448, L. 15 – 1450, L. 5). But during the Bar hearing Shohat was quite sure that a "trust" was agreed upon. Carl Lilley testified during the Court of Federal Claims trial that he never heard the word "trust" used in connection with the stock until 1996. (Tr. 905, L. 21 – 906, L. 4). AUSA Kirwin testified in the Court of Federal Claims trial that AUSA Miller, in discussing the Bio Chem stock, never used the words "trust" or "trustee." (Tr. 563, LL. 1-25). This was markedly different from the testimony in the Bar hearing. AUSA Atchison in the Court of Federal Claims trial testified that he does not recall Duboc instructing the transfer of the stock be in trust, nor does he recall any of the AUSA's using the word trust in relation to the transfer of the Biochem stock. AUSA Atchison further testified that he did not hear the word "trust" in this context until either late 1995, or early 1996. (Tr. 1092, L. 12 – 1093, L. 4). This testimony was not given during the Florida Bar hearing.

[10] Copy of Motion to submit the Court of Federal Claims transcript, attached as Appendix C.

Claims trial, for consideration on Petitioner's appeal, but was refused[11].

Petitioner's counsel during oral arguments in the Florida Supreme Court erred on a material issue. When questioned by Justice Wells as to whether the stock fund was received as fees, counsel mistakenly averred that they were not. This was clear error on a material issue, as the record of the previous proceedings all show Petitioner as claiming that the stock was received as fees.[12]

## REASONS FOR GRANTING THE WRIT

The Petitioner has been denied his Fourteenth Amendment rights to Due Process and Equal Protection of the Law by the Florida Supreme Court's refusal to consider after-discovered evidence that was clearly unavailable during the Bar trial, and which greatly undermines the findings of fact of the Referee.

The facts in the instant case are similar to those in *Amerifirst Federal Savings and Loan Association v. Cohen*, 454 So. 2d 626 (Fla. 3d DCA 1984). In *Amerifirst*, the creditor and debtor in a mortgage foreclosure action

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[11] Copy of the Florida Supreme Court Order, denying permission to submit the Court of Federal Claims transcript, attached as Appendix D.

[12] During the hearing before Judge Paul on February 2, 1996, Petitioner testified that he had received the stock for legal fees. (Tr. 74, LL. 4-5). Petitioner, in the Florida Bar hearing, said that the stock was his fee. (Tr. 796, LL. 12-17). Petitioner, in the Court of Federal Claims trial, referred to the stock as being in the form of legal fees. (Tr. 313, L. 17 – 317, L. 17).

entered a settlement agreement. The settlement agreement was " . . . [1] entered into by sophisticated and knowledgeable business persons [2] in an arms-length transaction [3] in which both parties received considerable benefits. . . . " *Amerifirst*, 454 So. 2d at 627. As the situation developed subsequent to the agreement, the creditor stood to make a profit of over four million dollars beyond being paid for the underlying indebtedness, with interest, attorneys fees, and costs. The appellate court upheld the settlement agreement and profit, and observed:

> . . . making a handsome profit on any agreement, due to events subsequent to the agreement, hardly renders the enforcement of the agreement unconscionable or the provisions in question a forfeiture. Cohen [debtor] gained much from this agreement and cannot now be permitted to back out of those provisions of the agreement which he deems harsh or onerous. [citations omitted].

*Amerifirst*, 454 So. 2d at 627. This language was repeated and reaffirmed in the subsequent appeal between the same parties, see *Amerifirst Federal Savings and Loan Association v. Cohen*, 499 So. 2d 935 (Fla. 3d DCA 1986).

**I. The Florida Supreme Court, in cooperation with the federal Government, denied Petitioner Due Process and Equal Protection of Law, by denying Petitioner's attempts to gain access to a crucial witness employed by the federal Government, and denying Petitioner's attempts to stay the Florida Bar proceedings until such time that he could compel the federal Government to comply.**

The Petitioner was denied Due Process and the Equal Protection of the Law, due to the federal Government's obstruction of his attempt to gain access to Mary Lee Warren, a federal Government employee, so as to be able to take her deposition, prior to the commencement of the Florida Bar hearing.[13] The federal Government obstructed this request, which had been properly presented under the regulations, refusing to reply until June 23, 2000, well after the conclusion of the Bar proceeding.[14] Mrs. Warren's testimony, in a deposition taken *after* the conclusion of the Bar proceeding, demonstrated that, she in her capacity as Deputy Assistant Attorney General, was unaware of any "trust" relationship existing between the federal Government and Petitioner.

The Florida Supreme Court, in denying Petitioner's Motion for Abatement or Stay[15], abused its discretion, in

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[13] See the letter to Assistant Attorney General Robinson, dated April 6, 2000, requesting permission to depose Mary Lee Warren, attached as Appendix E.

[14] See the letter from AUSA Petrie, dated June 23, 2000, denying permission to depose Mary Lee Warren, attached as Appendix F.

[15] See Motion for Abatement or Stay, attached as Appendix G, and Supplement to Motion for Abatement or Stay, attached as Appendix H.

that there was then pending, the U.S. Court of Federal Claims trial, which was to deal with the same issues as those before the Referee *and*, where there was power to compel the obstructed testimony.[16] Petitioner had filed his U.S. Court of Federal Claims action on October 22, 1996, while the Bar's complaint was not filed until October 1999. Florida case law has held it to be an abuse of discretion, to refuse to stay a subsequently-filed state court action, in favor of a previously-filed federal action, which involves the same parties and the same or substantially similar issues. *See, Florida Crushed Stone Co. v. Traveler's Indemnity Co.*, 632 So. 2d 217, 220 (Fla. 5th DCA 1994) (Citations omitted). *See also e.g., City of Miami Beach v. Miami Beach Fraternal Order of Police*, 619 So. 2d 447 (Fla. 3rd DCA 1993); *National American Ins. Co. v. Charlotte County*, 611 So. 2d 1284, 1285 (Fla. 2nd DCA 1992); *Schwartz v. DeLoach*, 453 So. 2d 454, 455 (Fla. 2nd DCA 1984), *citing Wade v. Clower*, 94 Fla. 817, 114 So. 548, 551 (1927). Judicial economy, and fundamental fairness concerns, strongly support the notion that the stay should have been granted, at least until the conclusion of the Court of Federal Claims trial. The Florida Supreme Court denied the motion.[17]

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[16] The Florida Supreme Court in *The Florida Bar v. Lusskin* 661 So. 2d 1211 (Fla. 1995), held, that a Referee in a disciplinary hearing has discretion to abate the proceeding for good cause. In *Lusskin*, an abatement was granted pending the appeal of an attorney's criminal conviction. The Court averred that, if the conviction was reversed, "any time spent on disbarment proceedings would have been wasted." *Id.*, at 1213.

[17] See Florida Supreme Court's order denying Motion for Abatement or Stay, attached as Appendix I.

**II. The Florida Supreme Court ignored Petitioner's claim that he was denied Due Process and Equal Protection of Law, because he was denied the right to present highly relevant expert witness testimony, the like of which had been admitted in prior and subsequent Florida Bar disciplinary hearings.**

The Petitioner was denied Due Process and the Equal Protection of the Law because he was precluded from providing the testimony of the Petitioner's expert witness of the former Ethics Director of the Florida Bar, Timothy Chinaris[18], a form of evidence previously recognized in other Bar proceedings in Florida[19]. This Court has held

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[18] The Referee ruled that she did not need to hear this testimony because, all attorneys admitted to the Florida Bar are deemed to be experts on the rules of ethics. (Fl.Bar Tr.617, L. 3 – 619, L. 3.). However, Mr. Chinaris was prepared to testify as to how the Florida Bar viewed – *on policy grounds* – such matters as those contained in the complaint, based upon his experience as the Ethics Director of The Florida Bar during the time period of 1989 – 1997, which is the same time period of the alleged violations. (See Resume of Timothy Chinaris, attached as Appendix M).

[19] The Florida Supreme Court has ruled that, an expert witness of the Florida Bar, who had extensive experience in the subject matter in question, was properly allowed to testify by the Referee. *The Florida Bar v. Hollander*, 607 So. 2d 412, 414 (Fla. 1993). Additionally, expert testimony has been allowed as to what might be called the "ultimate issue," whether the respondent committed violations concerning the rules of ethics. In the case of *The Florida Bar v. Carlon*, 2001 WL 1166349 (Fla.), the referee allowed the Bar's expert witness to testify as to whether the respondent had violated the rules of ethics, by allowing him to opine that "any fee over $6000 would be clearly excessive." The concept of a "clearly excessive" fee appears only in the attorney disciplinary rules of the Florida Bar, Rule

that the standard by which expert testimony is to be admitted is enunciated in this Court's case of *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).[20]

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4-1.5(a). Here the referee allowed expert testimony on the rules of ethics. Again, in *The Florida Bar v. Williams*, 753 So. 2d 1258, 1261 (Fla. 2000), the referee allowed the Bar's chief auditor to testify as to whether the respondent violated the rules of ethics by saying, "[respondent] was not in compliance with the rules governing trust accounts." Furthermore, both the Bar's and respondent's experts were allowed to testify as to whether the respondent complied with the rules regulating attorney trust accounts. *The Florida Bar v. Borja*, 554 So. 2d 514 (Fla. 1990).

[20] In *Kuhmo Tire Co.*, the Court held, relying on its prior holding in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993), that:

> We conclude that *Daubert's* general principles apply to the expert matters described in Rule 702. The rule, in respect to all such matters, "establishes a standard of evidentiary reliability." 509 U.S. ___, at 590, 113 S.Ct. 2786. It "requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." *Id.*, at 592, 113 S.Ct. 2786. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." 509 U.S. at 592.

Taking this holding step by step, it is clear that Chinaris' testimony had a "valid . . . connection to the pertinent inquiry", that his testimony went to the heart of the Bar's case and the Respondent's defense. Thus, Judge Ellis was required to find whether Chinaris had the requisite experience to testify as an expert based on his "knowledge and experience of [the relevant] discipline." There can be little doubt that as the former Ethics Director of the Florida Bar, Chinaris possessed the requisite credentials and knowledge to be considered an expert witness

That testimony would have sharply undermined a number of the unfavorable findings of the Referee.[21] The Florida Supreme Court chose to remain silent on this issue, even though it was preserved and briefed.[22]

The fact finding process of the Florida Courts was flawed to such an extent, as to deny the Petitioner Due Process and Equal Protection of the Law. The Petitioner was precluded from putting forth credible and significant favorable evidence in Florida, due to the federal Government's obstruction of Petitioner's access to key witnesses, as well as the unwarranted and prejudicial exclusionary rulings of the Referee. The U.S. Court of Federal Claims, which heard the case on a breach of contract theory, dealing with virtually the same issues, compelled this evidence and a decision, yet to be handed down, based upon the comments from the bench[23], Petitioner believes will be much more favorable to the Petitioner, casting a shadow over the credibility of the Florida decision.

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qualified to testify in the instant proceedings. The Court went on to say that an abuse of discretion standard is proper when reviewing the trial court's decision regarding the admission of expert testimony. *Kuhmo Tire Co.*, at 138, citing *General Electric Co. v. Joiner*, 522 U.S. 136, 138-139, 118 S.Ct. 512 (1997). Accordingly, Judge Ellis clearly abused her discretion when she refused to allow this expert testimony.

[21] Timothy Chinaris' Answers to Interrogatories, Fla. Bar proceeding, attached as Appendix N.

[22] Petitioner's Initial Brief in The Supreme Court of Florida, page 48, attached as Appendix O.

[23] Excerpt of Judge Horn's closing comments from the bench during the U.S. Court of Federal Claims trial, attached as Appendix P.

**III. The Referee in the Florida Bar trial erred in her conclusion that polygraph evidence was inadmissible in a Florida Bar disciplinary proceeding, and this issue having been formally briefed to the Florida Supreme Court, was seemingly ignored in that Court's decision.**

The Petitioner was denied Due Process and Equal Protection of the Law by the Florida Courts in their refusal to consider polygraph evidence, which had been accepted in prior proceedings, involving other lawyers similarly situated. The Petitioner sought to admit the results of his own polygraph[24], which established that he was truthful with respect to his recollection of the stock transfer to him. Additionally, the Petitioner sought to introduce polygraph testimony establishing that his pilot, Joaquin "Pete" Fuster, who had been present in Judge Paul's chambers, was not deceptive when he said that he did not hear the word "trust" mentioned by anyone at the May 17, 1994 pre-plea conference.[25] (Tr. 721). The Referee commented that Petitioner's polygraph report was tardy, "[s]o I'm inclined just to exclude that on a procedural ground" (Tr. 723). Secondly, the Referee denied the Fuster polygraph evidence, based upon her erroneous belief that, "in Florida, polygraph testimony is not admissible." (Tr. 724).

Polygraphs have been considered in Florida Bar proceedings. See *The Florida Bar v. Pavlick,* 504 So. 2d 1231,

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[24] Copy of polygraph report on F. Lee Bailey, attached as Appendix Q.

[25] Copy of polygraph report on Joaquin Fuster, attached as Appendix R.

1233 (Fla. 1987). *See also The Florida Bar v. Sepe*, 380 So. 2d 1040 (Fla. 1980), in which the Florida Bar's Petition for Approval of Conditional Guilty Plea, related that the results of polygraphs which were administered by both the prosecution and the defense, to the respondent, demonstrated that, "neither of them showed reaction indicative of deception." *Id.*

The Referee in the case at bar, refused to recognize *Pavlick*, finding it to be distinguishable. (Tr. 724). Pavlick's polygraph evidence turned on whether he was telling the truth when he denied in the Bar proceeding that he was guilty of being an accessory after the fact to a misprision of a felony, despite his federal *Alford* plea and adjudication of guilt as to the crime. The polygraph test introduced in the Bar proceeding, "bore out Pavlick's testimony" that he did not commit the crime. 504 So. 2d at 1233. The Court held that, "due process" supported the referee's decision to admit the polygraph results as, "evidence in mitigation." *Id.* at 1234. Here, due process required consideration of the polygraph evidence as to the merits *and* mitigation. Additionally, Justice Ehrlich commented in *Pavlick* (in his dissenting opinion) that, " . . . testimony of a witness who administered a polygraph test to respondent, which evidence, while **admissible in a bar proceeding . . .** " *Id.* at 1235 (*emphasis added*). Had the proffered polygraph evidence been accepted, it would have demonstrated that the Respondent's recollection on the principal issue in the entire case was truthful, in that there was no talk of trusts with AUSA Miller (who refused a polygraph test, along with Patterson and Shohat), on April 26, 1994. No reason has been given why

Petitioner was denied equal protection in this case[26], indeed, the Florida Supreme Court chose not to deal with the issue at all.

This Court addressed the polygraph issue in *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261 (1998), and upheld Military Rule of Evidence 707, prohibiting polygraph evidence in courts-martial. But three justices joined in Justice Kennedy's concurrence:

> I doubt, though, that the rule of *per se* exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does. . . . And, as Justice Stevens points out, there is much inconsistency between the Government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests.

*Id.* at 318, 118 S. Ct. at 1269 (Kennedy, J., concurring). Thus, combined with Justice Stevens' dissent, five justices believe it unwise to *per se* exclude polygraph evidence.

Whatever the ultimate answer may be as to the use of polygraphs in all cases, the denial of its use here violated the Petitioner's due process right to present evidence in mitigation, which may have been a significant factor in

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[26] Judge Ellis ruled that she was going to exclude the proffered polygraph evidence on procedural grounds, because it was submitted too late. (Fla. Bar Tr. 723). However, the District Court of Appeal of Florida, Second District, held that the exclusion of a witness due to his late disclosure was inappropriate. *Weiand v. State*, 701 So. 2d 562 (Fla. 2d DCA 1997). Here, the distinction between a witness and a piece of evidence cannot fairly be made.

the Referee's deliberations. *Pavlick, supra* at 45. While we contend that the polygraph evidence as to either examinee, Petitioner or Fuster, contradicts Referee's finding of a "trust," the exclusion of the polygraph evidence here was a serious error because, it could and should have tipped the "clear and convincing evidence" scale in the Petitioner's favor, particularly in a case so governed by credibility judgments.

**IV. The Referee's finding that a trust was created, in which Petitioner was the trustee, is an incorrect interpretation and misapplication of established Florida law and as such should have been reversed by the Florida Supreme Court, which was briefed and heard oral arguments, but chose instead to ignore the issue.**

The issue of whether a trust was created must be analyzed under the laws of Florida, because the attorneys involved were all Florida lawyers, dealing with an asset worth almost six million dollars. The Government contends that, Petitioner held the stock under an "oral trust" for the benefit of the Government. Under a trust, a "settlor" or "grantor" transfers property to a "trustee" or "grantee" who holds the property for the benefit of a "beneficiary." The elements of a trust are (1) the trust res (the property transferred by the settlor) and (2) the holding of title of the trust res by one person (the trustee) for the benefit of another (the beneficiary). *Bay Biscayne Co. v. Baile*, 73 Fla. 112, 75 So. 860, 868 (Fla. 1917). In the instant case, the Government contends that Duboc is the settlor, Bailey is the trustee, and the Government is the beneficiary.

While the word "trust" is not always required, the words used must be "sufficient to create a trust." *Zuckerman v. Alter*, 615 So. 2d 661 (Fla. 1993). Here the transfer document does not contain the word "trust," nor any restrictions or conditions. In fact, the transfer document[27] also contains directions to transfer other property to an account for the Government, which property was forfeited to the Government (i.e., not held in trust). The transfer document does not mention that there is a "trust" of any kind regarding either transfer. The transfer document, and related circumstances, are not consistent with an oral trust, but rather with an outright conveyance to Petitioner.

Besides the presence of the elements of a trust (discussed above), there are certain matters requisite to actually create such a trust, and these must be set forth with reasonable certainty. *Bay Biscayne Co. v. Baile*, 73 Fla. 112, 75 So. 860, 868 (Fla. 1917). Given the presence of several government attorneys familiar with Florida law, the absence of these requisites is significant.

There must be a sufficient declaration of trust which (1) evinces an intention to create a trust and (2) sets out the trust property, terms, and parties. Alternatively stated, there must be (1) sufficient words to raise the trust, (2) a definite subject-matter, and (3) a certain and ascertained object.

> For the purpose of proving the trust relationship the evidence must be clear and **unmistakable**

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[27] Copy of Biochem Pharma stock transfer document, attached as Appendix J.

> **both** as to the intent to create the trust **and** as to the execution of that intent. [citation omitted] The acts or words relied on must be **unequivocal**, implying that the person holds the property as trustee for another.

*Webster v. St. Petersburg Federal Savings & Loan*, 155 Fla. 412, 20 So. 2d 400, 402 (Fla. 1945) (*emphasis added*). "[T]here must be **certainty** as to the parties who are to take, and what they are to take." *Lines v. Darden*, 5 Fla. 51, 1853 WL 1263, at 10 (*emphasis added*). It is the intention of the settlor and trustee that is relevant, not the intention of a beneficiary, in the creation of a trust. *e.g., Warner v. Florida Bank & Trust Co.*, 160 F.2d 766 (11th Cir. Fla. 1947); *In re Estate of Herron*, 237 So. 2d 563 (Fla. 1970). No credible or admissible evidence as to the intention of Duboc has been presented. Petitioner has presented evidence as to his intention in accepting the conveyance of the stock. Considering the evidence of the intention of Duboc and Petitioner, there is no oral trust. AUSA Miller's contention that the purpose of the trust was to allow the Government to benefit from the appreciation of the stock, is contradicted by Petitioner and AUSA Kirwin, in that Petitioner had the right to sell the stock at his discretion.

An "oral trust" of personal property can be created (1) by parol or (2) partly in writing and partly by parol. However, the courts of Florida are cautious in recognizing trusts created entirely by parol. *Bailey v. Baron*, 269 So. 2d 45, 47 (Fla. 3d DCA 1972), [and cases cited therein]. "The acts or words relied on must be unequivocal, implying that the person holds the property as trustee for another." *Webster v. St. Petersburg Federal Savings & Loan*,

155 Fla. 412, 20 So. 2d 400, 402 (Fla. 1945). "If the court establishes a trust out of uncorroborated parol testimony, it will take property from the lawful holder solely because of unsubstantiated words." *Bailey, supra,* at 49. The intent to create a trust is found in the mind of the settlor, and the intent to accept property and serve as trustee is in the mind of the trustee. *See, e.g., Barber v. Adams,* 208 So. 2d 869 (Fla. 2d DCA 1968); *Wodonos v. Wodonos,* 62 So. 2d 78 (Fla. 1952) (" . . . nor is it suggested that the grantee had been informed in any fashion whatsoever that a trust was intended, or that she was accepting a conveyance of real estate subject to a beneficial interest in another." *Id.,* 79). If the Government is to be considered the settlor, then the question of why none of the Government lawyers prepared trust documents or even used the word "trust" in relation to the Biochem Pharma stock is critical.

Under Florida law, the party seeking to prove the trust, has the burden of proof as to the existence of an express trust. *Fraser v. Lewis,* 187 So. 2d 684 (Fla. 3d DCA 1966). In order to establish an oral trust, the evidence must be so clear, strong and unequivocal as to remove every **reasonable doubt** as to the existence of a trust. *Sottile v. Mershon,* 166 So. 2d 481 (Fla. 3d DCA 1964). This is the strongest burden of proof found in civil matters. Given this state of the law, the failure of the AUSA's, who were Florida attorneys, to create written documentation of the trust is an inference that weighs heavily against the Government's position. The evidence tendered by the Government falls far short of meeting the burden set forth above.

Beyond the Government's failure to present evidence that is so clear, strong and unequivocal, as to remove every reasonable doubt as to the existence of a trust and the terms of such a trust were, other elements also weigh against the Government. Florida law recognizes that if there is a document conveying the property, it is accorded great weight when considering parol evidence on the issue of the existence of an oral trust. "The determination whether a trust exists different from the **terms in which the conveyance vests the title** depends upon the intention of the parties [*i.e.*, grantor and trustee] at the time the instrument is executed." *Benbow v. Benbow*, 117 Fla. 37, 157 So. 512, 516 (Fla. 1934). The transfer document here, contains no restrictions or conditions. In fact, the transfer document also contains directions to transfer other property to an account for the Government, which property was forfeited to the Government (*i.e.*, not held in trust). The transfer document does not mention that there is a "trust" of any kind regarding either transfer. The transfer document is consistent with an outright conveyance, not in trust, to Petitioner. As stated by the Florida Supreme Court:

> A trust may be created by the execution of a conveyance in trust. The conveyance, however, must contain the essential elements of a trust. One of these so-called essentials is an intention of the settlor specifically to create a trust and not to do something else. [Citation omitted]. With respect to the instrument before us, the only intent, as shown by all the evidence, to be existent in the mind of the grantor, purported settlor X, was the intent to transfer the property.

*Smehyl v. Hammond*, 44 So. 2d 678 (Fla. 1950).

The instrument of conveyance in the instant case, likewise shows no intent of Duboc to create a trust, whereas other documents, unrelated to the subject stock, created by the Government and signed by Duboc, show such intent by utilizing the word "trust" or "trustee", in regard to the relationship with Petitioner[28].

Other legal principles support the conclusion of an outright conveyance to Petitioner. The Court in *Reid v. Barry*, 112 So. 846 (Fla. 1927), held: (1) A deed must be construed most strongly against the grantor, and most favorably to the grantee; (2) A deed absolute on face, based on consideration, conveys fee-simple title to the grantee; (3) Absolute control and power of disposition are inconsistent with the idea of a trust; and (4) parol evidence will not be heard to engraft a trust on a conveyance which is absolute in its terms.

Virtually all the facts in the instant case are inconsistent with a trust relationship. For example:

1. The asset (*i.e.*, speculative stock) is not an appropriate trust asset. "Gambling" with the res of a trust is not appropriate for a trustee. Yet this is how AUSA Miller describes his conversation with Petitioner in relation to the Biochem Pharma stock.

The concept of "gambling" with an asset is anathema to the concept of a trust. A speculative investment is not appropriate to be held as a trust asset.

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[28] Two asset transfer documents (Shaw Chuen & Sai Yuk), attached as Appendix K and L.

> All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, **not in regard to speculation**, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

*Harvard College v. Amory*, 26 Mass. 446, 461 (1830) (*Emphasis added*)

Florida paraphrased *Harvard* in its adoption of the prudent man rule for investment by fiduciaries adopted in 1953, see Section 518.11, Florida Statutes (1992) ("in the management of their own affairs, **not in regard to speculation**, but in regard to. . . . "). Although Section 518.11 was amended effective 1993, speculation remains unauthorized for a trustee. *See* Section 2.16, *Administration of Trusts in Florida* (Fla. Bar CLE 3d ed. 2001) [Also see discussion of *City of Miami Firefighters' & Police Officers' Retirement Trust v. Invesco MIM, Inc.*, 789 F. Supp. 392 (S.D. Fla. 1992), where a retirement trust sued its investment advisor, seeking damages under a tort theory for "**speculating in the stock of** Texas Air." *Id.* at 393. The court dismissed the tort action, but noted that the retirement trust could seek recovery through a claim for breach of contract.]. One noted commentator has included "**speculative shares of stock**" as a kind of investment which is universally condemned as a trust investment. *See* Section 227.6, *Scott's Abridgment of the Law of Trusts* (Little Brown 1960). Florida courts have consistently held the same. *Stevens v. Hooks*, 125 So. 2d 581, 582 (Fla. 2d DCA 1960)

(*Emphasis added*) (It is improper for a fiduciary to purchase "**highly speculative stocks.**").

2. An arrangement for a trustee to hold a speculative stock, and not be liable for its decline, is inconsistent with a trustee's obligation.

In a trust arrangement, if a trustee holds, or invests in, speculative stock, and there is a loss, the trustee is liable for the loss as a violation of his fiduciary investment duty. If the agreement is that the alleged trustee is not liable to the alleged beneficiary for a loss incurred from a speculative investment, it is not consistent with a fiduciary relationship, and is proof of the absence of a trust relationship. Here, AUSA Miller did not expect Petitioner to reimburse any loss of value, but rather that Petitioner should suffer the loss himself, even to the extent of not being able to receive a fee or to be reimbursed for funds expended on the maintenance of the properties.

3. Incurring personal liability to guarantee a loan on behalf of a trust is inconsistent with the obligations of a trustee. Trustees simply do not incur personal liability for a loan on behalf of a trust.

4. Having a complicated agreement involving a six million dollar asset, and not having it reduced to writing by a party who now asserts the existence of the complicated agreement, is not consistent with prudent business standards in today's society.

Equity has exclusive jurisdiction over suits to establish trusts. *Robinson v. Horne*, 192 So. 2d 332 (Fla. 1st DCA 1966). Equity views with disfavor suits brought long after

transactions have occurred, and after a party has relied to his detriment on the apparent situation. *Williams v. McAdow*, 103 Fla. 644, 137 So. 891 (Fla. 1931).

An equitable principle that applies in the instant case is appropriately stated as follows:

> No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."
>
> . . . .
>
> In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, . . . it will not exert its equitable powers in order to save one from the consequences of his own neglect.

*Geter v. Simmons*, 57 Fla. 423, 49 So. 131, 133 (Fla. 1909) (Citations omitted).

Petitioner represented Duboc in a drug prosecution brought by the Government. Discussions involving Duboc, Petitioner, and the Government eventually resulted in a plea agreement by Duboc, and a transfer of stock to Petitioner, to insure that there would be an asset for Petitioner's fees and costs, so that he would agree to continue to represent Duboc throughout the anticipated extended activities to follow the plea agreement. While Petitioner and the Government disagree as to the exact arrangement regarding this stock, they do agree that the

transfer was to provide for Petitioner's fees and costs and, to induce him to continue in the case. Petitioner applied for and was granted a line of credit against the shares, with the full knowledge of the Government, conditioned on Petitioner providing personal guarantees in case the stock collapsed too quickly to be liquidated. For months, the Government induced Petitioner to continue in the case, provide services, exercise complete control over the stock, and incur personal liability. These circumstances raise an estoppel against the Government to now assert the existence of an oral trust.

The Government owes a duty of fair dealing with its citizens and contractors. What should the Government, as a matter of fair dealing and as a matter of ordinary business prudence, have done if they believed a trust was to be established? The Government, as the party alleging the existence of an oral trust, has the burden of proof to show an oral trust. *Fraser v. Lewis, supra.* The Court can consider all the circumstances, including the standard of conduct which should be expected of Government agents in dealing with the public, including opposing attorneys. If it was the Government's requirement that there be a complicated arrangement regarding an asset that started out being worth approximately six million dollars, it had many opportunities to memorialize that specific arrangement in writing, and to communicate that understanding to Petitioner in writing.

The Government has not shown that at the time of the creation of the alleged oral trust, that a trust was intended by Duboc and Petitioner. The Government's proof does not show certainty as to the existence of an

alleged trust, its terms, or its beneficiaries. The Government's proof comes nowhere near removing every reasonable doubt as to the existence of a trust. Accordingly, the Court below erred in it's interpretation and application of Florida law, as to a material issue, in concluding that a trust had been formed, with Petitioner acting as a trustee.

At many points along the way, the Government could have done things to avoid the present situation, but the Government failed. The Government did *not* include the "trust" arrangement in the plea agreement, or the transfer document, or by a separate written agreement, or by letter or memo. These are things that an ordinary business person does as a matter of prudence. Petitioner, functioning under his own understanding and intent, and his understanding of the intent of Duboc, accepted the conveyance of stock as an outright conveyance, not in trust. Petitioner stayed in the case, and incurred personal liability regarding a loan on the stock. Beyond the Government's failure to prove an oral trust, the circumstances also raise an estoppel against the Government to even try.

As demonstrated above, history supports the inference that when the Florida Bar wishes to use expert witnesses, it is allowed to do so. As in *Pavlick* and the polygraph issue, a new set of rules appears to have been created by the Florida Supreme Court discriminating against Petitioner, and thus contaminating the fact-finding process.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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## APPENDIX


A. Supreme Court of Florida Decision .....App. 1

B. Amended Report of Referee .....App. 25

C. Motion to Submit Court of Federal Claims Transcript to Supreme Court of Florida ....App. 65

D. Supreme Court of Florida denial of Motion to Submit Court of Federal Claims Transcript...App. 72

E. Letter to Assistant Attorney General Robinson, dated April 6, 2000, requesting permission to depose Mary Lee Warren .....App. 73

F. Letter from AUSA Petrie, dated June 23, 2000, denying request to depose Mary Lee Warren.....App. 79

G. Emergency Motion for Abatement or Stay, dated May 24, 2000 .....App. 83

H. Supplement to Emergency Motion for Abatement or Stay, dated May 25, 2000.....App. 95

I. Supreme Court of Florida's denial of Motions for Abatement or Stay.....App. 98

J. Biochem Stock Transfer Document .....App. 99

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O. F. Lee Bailey's initial Brief to Supreme Court of Florida .....App. 115

P. Excerpt of Judge Horn's Comments from Court of Federal Claims Trial.....App. 168

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R. Joaquin Fuster's Polygraph Report.....App. 201

App. 1

**Supreme Court of Florida**

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No. SC96767

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**THE FLORIDA BAR,**
Complainant,

vs.

**F. LEE BAILEY,**
Respondent.

[November 21, 2001]

PER CURIAM.

F. Lee Bailey seeks review of a referee's report finding numerous, serious violations of the Rules Regulating the Florida Bar and recommending permanent disbarment. We have jurisdiction. *See* art. V, § 15, Fla. Const. For the reasons that follow, we approve the referee's findings of guilt and order that F. Lee Bailey be disbarred.

## FACTS

The Florida Bar filed a complaint against Bailey alleging seven counts of misconduct in violation of various Rules Regulating the Florida Bar in the course of Bailey's representation of his client, Claude Duboc.[1] After a final hearing was held over a number of days in which witnesses testified and exhibits were introduced into evidence, the referee issued a detailed twenty-four page

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[1] Count number six of the Bar's complaint was dismissed and is therefore not discussed further.

report containing her findings of fact and conclusions of law. The referee began the report with an overview of the factual setting that provided the framework for further findings as to all counts of charged misconduct:

In 1994, Bailey represented Duboc in a criminal case filed against Duboc by the United States alleging violations of Title 21 of the United States Code, which prohibits drug smuggling. The indictment also included forfeiture claims under Title 18 of the United States Code. Bailey worked out a deal with the United States Attorneys ("U.S. Attorneys") covering Duboc's plea, repatriation of assets, and payment of attorneys' fees. Under the agreement, Duboc would plead guilty and forfeit all of his assets to the United States Government. All of Duboc's cash accounts from around the world would be transferred to an account identified by the U.S. Attorney's Office. To deal with the forfeiture of Duboc's real and personal property, 602,000 shares of Biochem Pharma ("Biochem") stock, valued at $5,891,352.00, would be transferred into Bailey's Swiss account. Bailey would use these funds to market, maintain and liquidate Duboc's French properties and all other assets. In order to put this unusual arrangement in context, we set forth the specific factual findings surrounding this plea agreement and Bailey's role in it:

> The ultimate strategy employed by Respondent [Bailey] was that Duboc would plead guilty and forfeit all assets to the United States Government in the hopes of a reduction of sentence based on what [Bailey] described as "extraordinary cooperation." First, Duboc would identify and transfer all cash accounts from around the

world into an account identified by the United States Attorney's Office.

The forfeiture of the real and personal properties held in foreign countries presented some nettlesome problems. Duboc owned two large estates in France and valuable car collections, boats, furnishings and art works. Most of these properties were physically located in France. The two estates required substantial infusions of cash for maintenance.

The idea proposed by [Bailey] was to segregate an asset, a particular asset, one that would appreciate in value over time, so that when it came time for Duboc to be sentenced following entry of a plea of guilty, the United States Government would not argue in opposition to a defense claim that part of the appreciation in value was not forfeitable to the United States. Ultimately, the object was to sequester a fund which would not be entirely subject to forfeiture.

The identified asset was 602,000 shares of Biochem Pharma Stock. This would serve as a fund from which [Bailey] could serve as trustee and guardian of Duboc's French properties. Duboc's primary interest was to maximize the amount of forfeitures that would be turned over to the United States. This stock would provide a sufficient fund from which to market, maintain and liquidate the French properties and all other assets. [Bailey] explained that it would be prudent to hold the Biochem stock because the company was conducting promising research on a cure for AIDS, and the loss the government would suffer if large blocks of stock were dumped on the market.

> Money was transferred immediately into a covert account identified by the United States Attorney's Office. Duboc provided written instructions to the various financial institutions and the orders were then faxed. On April 26, 1994, the Biochem stock certificates were transferred to [Bailey's] Swiss account at his direction. The Respondent provided the account number.

On May 17, 1994, United States District Court Judge Maurice Paul held a pre-plea conference in his chambers. At the conference, the following arrangement as to attorneys' fees, including those for Bailey, was reached: "[T]he remainder value of the stock which was being segregated out would be returned to the court at the end of the day, and from that asset the Judge would be – a motion would be filed for a reasonable attorney's fee for Mr. Bailey." Later in the day on May 17, Duboc pled guilty to two counts in open court and professed his complete cooperation with the U.S. Attorney's Office.

Having outlined these predicate findings of fact, the referee then made the following factual findings and recommendations as to guilt in the context of each count of misconduct as alleged by the Bar in its complaint.

Count I of the Bar's complaint charged Bailey with commingling. Bailey was entrusted with liquidating stock that belonged to Duboc, referred to as "the Japanese Stock." Upon liquidation, Bailey was then to transmit the proceeds to the United States. Bailey sold the Japanese stock and deposited approximately $730,000 into his Credit Suisse account on or about July 6, 1994. Bailey then

transferred the money into his Barnett Bank Money Market Account. The money was paid to the United States Marshal on or about August 15, 1994. The referee found that Bailey admitted that his money market account was not a lawyer's trust account, nor did Bailey create or maintain it as a separate account for the sole purpose of maintaining the stock proceeds. In concluding that Bailey had engaged in commingling, the referee rejected Bailey's claims that there were no personal funds in the Barnett Bank account at the time Bailey transferred the funds from the Japanese Stock into this account, and that Bailey's deposit of the proceeds into a non-trust account was "inadvertent error." The referee concluded that Bailey violated Rule Regulating the Florida Bar 4-1.15(a) by failing to set up a separate account for these funds and also by commingling client funds with his personal funds.

Count II of the Bar's complaint charged Bailey with misappropriating trust funds and commingling. On or about May 9, 1994, the 602,000 shares of Biochem stock were transferred into Bailey's Credit Suisse Investment Account. Bailey sold shares of stock and borrowed against the stock, deriving over $4 million from these activities. Bailey then transferred $3,514,945 of Biochem proceeds from the Credit Suisse account into his Barnett Bank Money Market Account. Bailey had transferred all but $350,000 of these proceeds into his personal checking account by December 1995. From this account, Bailey wrote checks to his private business enterprises totaling $2,297,696 and another $1,277,433 for other personal expenses or purchases. Bailey further paid $138,946 out of

his money market account toward the purchase of a residence.

The referee rejected Bailey's two defenses to the Bar's charge of misappropriation: (1) he never held the stock in trust for Duboc or the United States; rather, it was transferred to him in fee simple absolute; and (2) this stock was not subject to forfeiture. The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3-4.3 (lawyer shall not commit any act that is contrary to honesty and justice), 4-1.15(a) (commingling funds), 4-8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 4-8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and 5-1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a specific purpose).

Count III charged Bailey with continuing to expend Biochem funds in contravention of two federal court orders. In January 1996, Judge Paul issued two orders regarding the Duboc criminal case; one on the 12th and the other on the 25th. The January 12 order relieved Bailey as Duboc's counsel, substituting the Coudert Brothers law firm. The order further required Bailey to give within 10 days "a full accounting of the monies and properties held in trust by him for the United States of America." The order froze all of the assets received by Bailey from Duboc and further prohibited their disbursement. The January 25 order directed Bailey to bring to a February 1, 1996, hearing all of the shares of Biochem stock that Duboc had turned over to Bailey. The referee found that Bailey continued to use the Biochem proceeds

that he held in trust after service and knowledge of the January 12 and January 25, 1996, orders. The referee rejected Bailey's argument that the January 25 order did not restrain him from utilizing the funds to meet his prior financial obligations, finding that "the order . . . require[d] Respondent to bring with him the Biochem Pharma stock or any replacement asset. . . . Clearly there were judicial restraints in place when the money was disbursed."

The referee found Bailey guilty of violating Rules Regulating the Florida Bar 3-4.3 (lawyer shall not commit an act that is contrary to honesty and justice), rule 4-8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), rule 4-8.4(c) (lawyer shall not engage in conduct involving deceit, dishonesty, fraud or misrepresentation), and rule 5-1.1 (requiring money or other property entrusted to an attorney to be held in trust and applied only for a specific purpose). The referee further found that by knowingly expending trust account funds from the money market account after entry of the January 12 order, Bailey violated Rules Regulating the Florida Bar 3-4.3, 4-3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal), 4-8.4(a) (lawyer shall not violate the Rules of Professional Conduct), and 4-8.4(d) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Count IV of the Bar's complaint charged Bailey with giving false testimony. The referee found that Bailey testified falsely before Judge Paul and the U.S. Attorneys that he did not see the January 12 or January 25 orders until the morning of a civil contempt hearing held on February

2, 1996. The referee further found that Bailey was not being truthful when: (1) in his answer to the Bar's complaint, Bailey denied that he had received the orders and that he had testified falsely before Judge Paul; and (2) Bailey testified before the referee at the final hearing.

Specifically, the referee found numerous reasons why this testimony was false. First, Bailey had a conversation with the Assistant U.S. Attorney about the terms of the January 12 order following its entry. Indeed, on January 19, when Bailey met with the Assistant U.S. Attorneys, he accused them of obtaining the order from the judge ex parte. In addition, when Bailey returned to his Palm Beach office on January 18, he marshaled documents in support of the accounting that the January 12 order required him to provide. In the letter to Judge Paul dated January 21, 1996, Bailey "plainly concedes that he knew of the terms of the order as early as January 16, 1996." In that letter, he referred to the manner, mode and method by which Judge Paul entered the order. He complained in the letter that "Your Honor was persuaded to act on representations which are *at a minimum* subject to sharp challenge." As the referee notes, "these assertions could not have been made *unless* [Bailey] had seen the January 12 order." Further, as to the January 25, 1996, order, it was served upon Bailey by "fax transmission, United States mail, and personally by the U.S. Marshal's Service pursuant to the very terms of the order." Based on these factual findings, the referee found Bailey guilty of violating Rules Regulating the Florida Bar 3-4.3, 4-8.4(b), 4-8.4(c), and 4-3.3(a)(1) (lawyer shall not knowingly make a false statement of material fact or law to a tribunal).

Count V of the Bar's complaint charged Bailey with self-dealing in the course of his representation of Duboc. The referee found that Bailey's claim that he owned the stock in fee simple created a financial conflict of interest between Bailey and Duboc. "The more [Bailey] received, the less his client would produce in his column at the time of sentencing." This finding refers to the fact that under the plea agreement, it was in Duboc's interest to maximize the amount of assets he forfeited to the United States Government in hopes of receiving a reduced sentence, and that for Bailey to claim entitlement to the appreciation of the stock would be directly contrary to the interests of his client. The referee concluded that Bailey's claim of entitlement to the stock was in no way consistent with the premise that ultimate approval and payment of fees rested with Judge Paul.

The referee further found that Bailey used information relating to his representation of Duboc to the disadvantage of his client. The referee found that Bailey managed one of the French properties to his own personal benefit by procrastinating in his efforts to sell the property. The referee ultimately concluded that Bailey had engaged in self-dealing, and therefore violated Rules Regulating the Florida Bar 4-1.7(b) (lawyer shall not represent a client if lawyer's exercise of independent professional judgment may be materially limited by the lawyer's own interest), 4-1.8(a) (lawyer shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client), and 4-1.8(b) (lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation).

Count VII of the Bar's complaint charged Bailey with ex parte communications, self-dealing, and disclosure of confidential information. In connection with this count, the referee found that on May 17, 1994, Duboc appeared before Judge Paul and entered a plea and cooperation agreement. Duboc pled guilty to counts II and III of the indictment. The referee found that the only way Duboc would get a reduced sentence was if Judge Paul was convinced that Duboc had completely and totally cooperated and had forfeited all of his assets to the United States. On January 4, 1996, Bailey wrote a letter to Judge Paul stating, "*I have sent no copies of this letter to anyone,* since I believe its distribution is within Your Honor's sound discretion." (Emphasis added.) This letter contains an express admission that it was ex parte. In this ex parte letter to Judge Paul, Bailey stated that: (1) Duboc pled guilty because he had no defense due to the strength of the case, (2) Duboc chose this course because it was his only option, not in a spirit of remorse or cooperation, (3) Duboc was a "multimillionaire druggie," (4) by consulting with other counsel, Duboc was no longer acting in the spirit of cooperation, and (5) Duboc's new defense team had interests contrary to those of his client and the court. Bailey sent a second letter to Judge Paul on January 21, 1996, a copy of which was sent to the U.S. Attorney's Office, threatening to seek an order to invade the attorney-client privilege in an attempt to defeat Duboc's position that the stock was held in trust.

The referee found that both of Bailey's letters were sent to compromise Duboc before the sentencing judge and to protect Bailey's interest and control of Duboc's

and the U.S. Government's money. The referee recommended that Bailey be found guilty of violating Rules Regulating the Florida Bar 4-1.6(a) (lawyer shall not reveal information relating to representation of a client), 4-1.8(a), 4-1.8(b), 4-3.5(a) (lawyer shall not seek to influence a judge), 4-3.5(b) (in an adversary proceeding, lawyer shall not communicate as to the merits of the cause with a judge).

Having made the above findings of fact and recommendations as to guilt, the referee considered the appropriate discipline for Bailey's misconduct:

Preliminarily, the referee noted that Bailey was 67 years old at the time of the report. He has been a member of The Florida Bar since 1989, and was admitted to the Massachusetts Bar in 1960. The referee further states "[a]ccording to the Respondent, he is a member of The Supreme Court of the United States, every circuit in the United States, the Tax Court, the Federal Court of Claims, and as of the time of the hearing was admitted in North Carolina and California pro hac vice on two cases."

Prior to considering any aggravating or mitigating factors, the referee stated that "any of the violations of the rules regulating the Florida Bar which have been proven by the Bar as set forth above, would singularly warrant the recommended discipline [of disbarment]. Collectively, the numerous violations, all of which are serious and egregious, plainly warrant permanent disbarment." The referee then listed the following aggravating factors: dishonest or selfish motive, a pattern of misconduct, multiple offenses, submission of false statements,

refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law. Further, the referee considered that a federal judge recently found Bailey to be in civil contempt in another case. The referee noted that Bailey has two prior disciplinary actions; a censure in Massachusetts in 1970 and a suspension for one year of the privilege of applying for permission to appear pro hac vice in New Jersey in 1971; however, these incidents were too remote in time to be considered in aggravation. The referee did not find any mitigation. Finally, the referee recommended that the Bar be awarded all reasonable costs. Bailey petitioned this Court for review, challenging multiple aspects of the referee's report.

## ANALYSIS

In our system of discipline regulating the conduct of lawyers, our referees, who are circuit court judges, serve as the finders of fact. They hear the testimony of witnesses, judge their credibility, and receive evidence, as would be done in any trial in a court of law. As with any other fact finder, this Court will uphold a referee's findings of fact when they are supported by competent substantial evidence in the record below. *See Florida Bar v. Jordan*, 705 So. 2d 1387, 1390 (Fla.1998). As we have explained, where the findings of fact are supported by competent substantial evidence, this Court will not reweigh the evidence and substitute our judgment as to the findings of fact of the referee. *See Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996). Nevertheless, in any Bar disciplinary case, and in particular a case where the recommendation is disbarment, the most severe penalty we

can administer to an attorney, we engage in a careful and thorough review of the record. Having reviewed the extensive record before us, we conclude that there is competent substantial evidence to support the referee's findings of fact and conclusions of guilt as to each count of misconduct. Although each of the rule violations is extremely serious, ranging from trust account violations to misappropriation of funds, lying to a federal judge, self-dealing and compromising the position of a client, we focus on Bailey's actions regarding the Biochem stock (count II) because the gist of his defense in this case was that the Bar never established the stock was to be held by Bailey in trust. In connection with this, we also review whether, regardless of Bailey's claim that the stock had been transferred to him in "fee simple," this claimed right to the stock would permit him to act in disregard of the judge's orders (count III).

*The Biochem Pharma Stock (Count II)* – The most contested issue in this case is whether a trust was created with the transfer of the Biochem stock from Duboc to Bailey. The Bar argued that the plea agreement with the U.S. Government provided that Bailey was to hold the stock in trust for the benefit of the U.S. Government. Bailey would use the stock to maintain and liquidate Duboc's properties. After this was accomplished, the stock or its replacement assets would be forfeited to the United States in order to maximize any benefit to Bailey's client for his cooperation. However, Bailey argued that the stock was transferred to him in fee simple. He agreed that he was required to utilize the Biochem stock to derive the funds necessary to maintain and liquidate the French properties. However, Bailey asserted that after the

properties were sold, he was only accountable to the United States for the value of the stock on the date that Duboc transferred it to Bailey's Swiss account (which was approximately $6 million), and not for any appreciation – which, as of January 1996, amounted to over $10 million. In other words, Bailey claims that he was entitled to all of the Biochem stock and proceeds from the sale of the stock, minus the approximate $6 million for which he was accountable to the U.S. Government. As he wrote Judge Paul in his letter of January 21, 1996:

> I viewed [the value of the stock of $5,891,352.00 on May 9, 1994] as an account in which the United States had an interest to this extent: after the payment of costs associated with the case and fees approved by Your Honor, any balance of the $5,891,352.00 remaining would revert to the United States. Because of this view, I did not declare the funds to be income to myself.

(Emphasis omitted.)

We conclude that regardless of the manner in which he was to hold the stock, Bailey is guilty of the most serious and basic trust account violations. The stock, by his own admission, was given to Bailey by his client neither as a gift, nor as an earned fee. Rather, the stock was given to Bailey to be used for the benefit of Duboc, and ultimately the U.S. Government. Bailey was required to use the stock to maximize Duboc's forfeitures to the U.S. Government in the hope that Duboc would receive a reduction of sentence for his cooperation. In his January 21, 1996, letter to Judge Paul, even Bailey recognized that the U.S. Government had an interest in the transfer value

of the Biochem stock. Nevertheless, from the day it was transferred to him, Bailey treated the money as his own.

Rule Regulating the Florida Bar 3-4.1[2] charges every member of the Bar with knowledge of the standard of ethical and professional conduct prescribed by this Court, and with notice of rule 3-4.1. Rule 4-1.15 provides:

> A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the lawyer receives written permission from the client to do so and provided that such written permission is received prior to maintaining the funds other than in a separate bank account. *In no event may the lawyer commingle the client's funds with those of the lawyer or those of the lawyer's law firm.* Other property shall be identified as such and appropriately safeguarded.

(Emphasis added.) Bailey admits that he was accountable to the United States for the approximate $6 million value of the Biochem stock on the day of transfer. Nevertheless,

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[2] Rule 3-4.1 provides, "Every member of the Florida Bar . . . is within the jurisdiction of this court . . . and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court."

when the stock was transferred, Bailey made absolutely no effort to segregate or safeguard this money. Rather, he commingled the money with the funds in his Credit Suisse account, sold shares of the stock, and obtained a line of credit on the stock, deriving over $4,000,000 from these activities. As noted by the Bar at oral argument, if on January 1, 1996, the value of Biochem stock fell to zero, Bailey would have already taken $3.5 million out of the Biochem stock fund and transferred it to his personal money market account. Bailey transferred all but $350,000 of these proceeds into his personal checking account and used some or all of this money to pay for various business and personal expenses.

Further and importantly, Bailey admits that Judge Paul would approve the amount of Bailey's fee for representing Duboc, and that his fee would be taken from the approximate $6 million value of the Biochem proceeds. Therefore, even if some of the initial $6 million corpus was to be used for payment of an attorneys' fee, Bailey was not entitled to the fee until it was approved by Judge Paul – a fact that Bailey admits in his January 21 letter to Judge Paul, and that he admits in this case. Indeed, in a letter written to his own client, Duboc, before a falling out occurred, Bailey explained that:

> You do not face the dilemma since I will be paid with Chief Judge Paul's approval – only that amount which is commensurate with the result achieved in your case, and the amount of work that went into it. Our interests are therefore in perfect alignment.

Rule 5-1.1(a) provides: "Money or other property entrusted to an attorney for a specific purpose, including

advances for costs and expenses, is held in trust and must be applied only to that purpose." When the approximate $6 million transfer value of the Biochem stock was given to Bailey, it was given to him for specific purposes: to maintain the property of his client and then to return the remainder to the U.S. Government. Therefore, under Rule Regulating the Florida Bar 5-1.1, Bailey had a duty to safekeep this property and use it only for the aforementioned purposes. The transfer value of this stock or its proceeds could neither be commingled nor could it be withdrawn. The fact that a portion of this fund was to be used for payment of any attorneys' fees only serves to highlight this fact – that the monies were to be held in trust for a specific purpose.

If Bailey's fee had been earned, then it could have and should have been withdrawn from a trust account; the failure to do so would have been a violation of trust account rules. *See Florida Bar v. Tillman*, 682 So. 2d 542 (1996) (holding that rule 4-1.15(c) requires fees to be withdrawn when they become due and the failure to do so constitutes a trust account violation). However, if money is given to a client to be applied to fees when they become earned, much like a retainer, these monies cannot be withdrawn from a trust account and spent until they are earned. *See In re Sather*, 3 P.3d 403, 410 (Colo. 2000) ("[U]nearned portion[s] of . . . advance fees must be kept in trust and cannot be treated as the attorney's property until earned."). In this case, by express agreement, Bailey was not entitled to any fees until determined and approved by Judge Paul. Thus, he was expressly prohibited from withdrawing and spending any portion of the

stock for his own personal benefit until approved by Judge Paul. *See generally Spann*, 682 So. 2d at 1070-71.

In light of the foregoing, we conclude that regardless of the manner in which the stock was transferred to Bailey and the exact words used, Bailey violated rule 4-1.15 and rule 5-1.1(a) as to approximately $6 million (i.e., the value of the stock at the time it was transferred to Bailey).[3]

We further note that even if there was no precise agreement with the U.S. Government regarding the necessity to segregate and safeguard the stock and its proceeds, Bailey's obligations as to his client's property or the property of a third party flow from the Rules Regulating the Florida Bar, rules that are imposed as a condition of all attorneys' membership in The Florida Bar. Indeed, one of the most solemn obligations that separate lawyers from any other professionals relates to the safeguarding and segregation of a client's property.

*The January 12 and January 25 orders (Count III)* – Judge Paul's January 12, 1996, order provides that "[a]ll monies, real and personal property and other assets received by Bailey from or on behalf of Duboc, including the aforementioned Biochem Pharma stock shall be frozen as of the date of this order and no further disbursement of any of these funds shall be made unless authorized by this Court." The January 25 order required Bailey to "bring with him all shares of stock of Biochem Pharma, Inc. held by him, or by others, which represent

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[3] We approve the referee's other findings regarding rule violations under this count without further discussion.

the stock turned over to him by the Defendant, Claude Duboc, or Duboc's representatives. If the Biochem Pharma, Inc. stock has been replaced by any other form of asset while in the possession of Mr. Bailey, then the replacement stock will be brought to this Court at the time of the above hearing."

As mentioned earlier, Bailey took no action to segregate or safeguard the value of the Biochem proceeds for which he admits he was accountable to the United States. Because Bailey held approximately $6 million in trust for the Government, and Bailey commingled money from the Biochem proceeds with his personal assets, we conclude that Judge Paul's orders covered that portion of the Biochem proceeds that Bailey was holding in his money market account or his personal checking account.

Even if Bailey felt that he was entitled to the stock proceeds in his personal account, this does not permit him to act in contravention of two federal court orders. In *Florida Bar v. Gersten*, 707 So. 2d 711, 713 (Fla. 1998), this Court found that an attorney who failed to comply with a court order violated rule 4-3.4(c). The Court stated that "[a]n attorney is not permitted to ignore and refuse to follow a court order based upon his personal belief in the invalidity of that order. To countenance that course is to court pandemonium and a breakdown of the judicial system." *Id.* (quoting *Florida Bar v. Rubin*, 549 So. 2d 1000, 1003 (Fla. 1989)). Similarly, in *Florida Bar v. Canto*, 668 So. 2d 583 (Fla. 1996), this Court found that an attorney who continued to litigate a case despite being disqualified from the case had violated rules 3-4.3, 4-3.4(c), 4-8.4(a), and 4-8.4(d), in addition to other rules. We found that "Canto's repeated refusal to accept the directives of

the court are of a most serious order. The record contains unrefuted evidence of the injury he has caused his former clients, third parties, and the courts. Such disdain for the legal system simply can not be tolerated." *Id.* at 585. Bailey's disregard of the January 12 and January 25 orders requiring him not to utilize or expend Biochem proceeds similarly demonstrates disdain for the federal court that issued those orders. Therefore, we conclude that Bailey violated rules 3-4.3, 4-3.4(c), 4-8.4(a) and 4-8.4(d) by acting in contravention of Judge Paul's orders.

## DISCIPLINE

Bailey has committed multiple counts of egregious misconduct, including offering false testimony, engaging in ex parte communications, violating a client's confidences, violating two federal court orders, and trust account violations, including commingling and misappropriation. Disbarment is the presumed discipline for many of these acts of misconduct. For example, as to Bailey's mishandling of the Biochem stock, Standard 4.11 of the Florida Standards for Imposing Lawyer Sanctions provides: "Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." As to Bailey's violation of the January 12 and 25 orders, Standard 6.21 provides that "[d]isbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes . . . potentially serious interference with a legal proceeding." Regarding Bailey's ex parte communication with Judge Paul, Standard 6.31 provides that "[d]isbarment is appropriate when a lawyer: . . . (b) makes an unauthorized ex

parte communication with a judge or juror with intent to affect the outcome of the proceeding."

Case law also supports disbarment for the types of misconduct committed by Bailey. *See Florida Bar v. Rightmyer*, 616 So. 2d 953, 955 (Fla. 1993) (holding that "[n]o breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process"); *Florida Bar v. Leon*, 510 So. 2d 873 (Fla. 1987) (attorney disbarred for engaging in ex parte communication with judge to achieve alteration of sentences and then lying under oath to Judicial Qualifications Commission). Further, "[t]his Court deals more severely with cumulative misconduct than with isolated misconduct." *Florida Bar v. Greenspahn*, 386 So. 2d 523, 525 (Fla. 1980); *see also Spann*, 682 So. 2d at 1074.

Bailey has committed some of the most egregious rules violations possible, evidencing a complete disregard for the rules governing attorneys. "[M]isuse of client funds is one of the most serious offenses a lawyer can commit. Upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment." *Tillman*, 682 So. 2d at 543. Bailey's false testimony and disregard of Judge Paul's orders demonstrate a disturbing lack of respect for the justice system and how it operates. Bailey's self-dealing and willingness to compromise client confidences are especially disturbing. Not only did Bailey use assets that his client intended to forfeit to the U.S. Government for Bailey's own purposes, but Bailey also attempted to further his own interests by disparaging his client in an ex parte

letter to the judge who would sentence his client. Bailey's self-dealing constitutes a complete abdication of his duty of loyalty to his client. His willingness to compromise his client for personal gain shows an open disregard for the relationship that must be maintained between attorney and client: one of trust, and one where both individuals work in the client's best interest. Such misconduct strikes at the very center of the professional ethic of an attorney and cannot be tolerated. As we have repeatedly stated, discipline must serve three purposes:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

*Florida Bar v. Brake*, 767 So. 2d 1163, 1169 (Fla. 2000) (quoting *Florida Bar v. Cibula*, 725 So. 2d 360, 363 (Fla. 1998)).

In light of Bailey's egregious and cumulative misconduct, and the absence of any mitigating factors, we conclude that disbarment is not only appropriate in this case, but necessary to fulfill the threefold purpose of attorney discipline. By this disbarment, Bailey's status as a member of The Florida Bar shall be terminated and he may not reapply for readmission for a period of five years, and

then he may "only be admitted again upon full compliance with the rules and regulations governing admission to the bar." R. Regulating Fla. Bar 3-5.1(f). This includes retaking the Florida bar examination, complying with the rigorous background and character examination, and demonstrating knowledge of the rules of professional conduct required of all new admittees.[4]

## CONCLUSION

Accordingly, F. Lee Bailey is hereby disbarred from the practice of law in the State of Florida. The disbarment will be effective thirty days from the filing of this opinion so that Bailey can close out his practice and protect the interests of existing clients. If Bailey notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the disbarment effective immediately. Bailey shall accept no new business from the date this opinion is filed until he is readmitted to the practice of law in Florida. Judgment is entered for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for

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[4] Although we regard these rule violations as extremely serious and warranting disbarment, we do not accept the referee's recommendation of permanent disbarment. Under the rules, the minimum period of disbarment is for five years (and thereafter until the attorney is readmitted to the practice of law). *See* R. Regulating Fla. Bar 3-5.1(f). In 1998, the Court amended the Rules Regulating the Florida Bar to specifically provide for permanent disbarment. *See In re Amendments to Rules Regulating The Florida Bar*, 718 So. 2d 1179, 1181 (Fla. 1998) (amending rule 3-5.1(f) "to authorize permanent disbarment as a disciplinary sanction").

recovery of costs from F. Lee Bailey in the amount of $24,418.60, for which sum let execution issue.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS, and QUINCE, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS DISBARMENT.

Original Proceeding – The Florida Bar

John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Staff Counsel, Tallahassee, Florida; David Robert Ristoff, Branch Staff Counsel, and Debra Joyce Davis, Assistant Staff Counsel, Tampa, Florida; and Terrance E. Schmidt, Jacksonville, Florida,

for Complainant

Bruce Rogow and Beverly A. Pohl of Bruce S. Rogow, P.A., Fort Lauderdale, Floida; Don Beverly, West Palm Beach, Florida; and Russell S. Bohn of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach, Florida,

for Respondent

P. Michael Patterson, United States Attorney, Tallahassee, Florida,

for the Northern District of Florida, Amicus Curiae

A TRUE COPY
Attest:
THOMAS D. HALL, Clerk
Supreme Court of Florida
By /s/ Lena Blakeley
Deputy Clerk [SEAL]

**IN THE SUPREME COURT OF FLORIDA**
**(Before A Referee)**

The Florida Bar,

Complainant,

v.

F. Lee Bailey,

Respondent,

Case No. SC96767
TFB Number
1996-51,085(15B)
1997-50,110(15A)

## AMENDED REPORT OF REFEREE

I. *Summary of Proceedings:* Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates May 30 through June 5, 2000:

The following attorneys appeared as counsel for the parties:

For The Florida Bar: David R. Ristoff, Esq.
Debra J. Davis, Esq.
Terrance E. Schmidt, Esq.

For The Respondent: Don Beverly, Esq.
F. Lee Bailey, Esq.

*Symbols and References:*

In this report filed by the Referee, The Florida Bar, Complainant, will be referred to as **"The Florida Bar"**. The Respondent, F. Lee Bailey will be referred to as **"Respondent."**

"**TR**" will refer to the transcript of the final hearing before the Referee in the instant case Supreme Court Case No. SC96767, held May 30, 2000 through June 5, 2000.

"**Ex.**" will refer to Exhibits presented by The Florida Bar and the Respondent at the final hearing before the Referee in the instant case.

"**Rule**" or "**Rules**" will refer to the Rules Regulating The Florida Bar. "**Standards**" **or** "**Standards**" will refer to Florida Standards for Imposing Lawyer Sanctions.

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is charged:

After considering all the pleadings and evidence before me, some pertinent portions of which are set forth below, I hereby make the following findings of fact that will provide an overview of the sequence of events that led us to these proceedings. This overview provides the framework for further findings as to all six counts of charged misconduct.

1. Claude Duboc was indicted by the United States of America in early 1994 in the Northern District of Florida on a multi-count indictment charging violations of Title 21 of the United States Code which proscribes drug smuggling. The indictment also included forfeiture claims under Title 18.

2. Duboc, who enjoyed dual citizenship in both France and the United States, was found in Hong Kong in March 1994 and arrested on the indictment. (Exhibit "H," page 10).

3. After Duboc waived extradition, he was transferred from Hong Kong to the Northen District of Florida

to respond to the charges. He was transported to Florida by way of Los Angeles.

4. Upon Duboc's arrival in Los Angeles, Attorney Robert Shapiro was retained by Duboc's ex-wife, Robin Duboc, and Attorney Mike Nassatir was retained by a third party. (TR, 754). Respondent was then contacted by Robert Shapiro to be Florida Counsel to Duboc in anticipation of trial in the Northern District of Florida.

5. Respondent was aware that a three million dollar fee had been discussed as between Shapiro and Robin Duboc, and according to Respondent, would be allocated at "one [million] for each lawyer." She anticipated the fees would come from private funding. (TR 760)

6. Before he met his client for the first time, Respondent met with Assistant U.S. Attorneys Gregory Miller and Thomas Kirwin at the United States Attorney's Office in Gainesville. (TR 122). On or about April 16, 1994, Respondent flew to Los Angeles and met with Robert Shapiro, Mike Nassatir and Claude Duboc. (Shapiro Deposition at page 10).

7. On April 19, 1994, a dinner meeting was held in Tallahassee to discuss Duboc's case. Participating in the discussion were Robert Shapiro, the Respondent, Tom Kirwin and Roy Atchison with the United States Attorney's Office and Carl Lilley, special agent with the drug enforcement administration. During this meeting, the issue of attorney's fees arose. A legal fee of three million was proposed, to be allocated at one million each for Shapiro, Bailey and Nassatir. (Shapiro Deposition at page 11, lines 15-23). Miller did not indicate that the request would be an unreasonable request. (TR123), (TR241-242)

8. Following the dinner meeting, Duboc, Tom Kirwin, Greg Miller, Roy Atchison, Respondent and Carl Lilley had a series of meetings to discuss a plea, repatriation of assets and payment of attorney fees. Lists of Duboc's assets were prepared by Respondent and Lilley. An ingenious plan was then proposed and negotiated by Respondent. Indeed, Respondent testified before the referee about how he manipulated the government: "And this list was delivered to the prosecutors and they were given overnight to let it marinate, because I wanted to whet their appetites for a deal to be made the following day, and the deal having been made would enable them to start transferring." (TR 772).

9. The ultimate strategy employed by Respondent was that Duboc would plead guilty and forfeit all assets to the United States Government in the hopes of a reduction of sentence based on what the Respondent described as "extraordinary cooperation." (TR 763). First, Duboc would identify and transfer all cash accounts from around the world into an account identified by the United States Attorney's Office.

10. The forfeiture of the real and personal properties held in foreign countries presented some nettlesome problems. Duboc owned two large estates in France and valuable car collections, boats, furnishings and art works. Most of these properties were physically located in France. The two estates required substantial infusions of cash for maintenance.

11. The idea proposed by Respondent was to segregate as asset, a particular asset, one that would appreciate in value over time, so that when it came time for Duboc to be sentenced following entry of a plea of guilty, the United States Government would not argue in opposition to a defense claim that part of the appreciation in value was not forfeitable to the

United States. Ultimately, the object was to sequester a fund which would not be entirely subject to forfeiture.

12. The identified asset was 602,000 shares of Biochem Pharma Stock. This would serve as a fund from which Respondent could serve as trustee and guardian of Duboc's French properties. Duboc's primary interest was to maximize the amount of forfeitures that would be turned over to the United States. This stock would provide a sufficient fund from which to market, maintain and liquidate the French properties and all other assets. Respondent explained that it would be prudent to hold the Biochem stock because the company was conducting promising research on a cure for AIDS, and the loss the government would suffer if large blocks of stock were dumped on the market. (Ex. 17 page 3).

13. Money was transferred immediately into a covert account identified by the United States Attorney's Office. Duboc provided written instructions to the various financial institutions and the orders were then faxed. On April 26, 1994, the Biochem stock certificates were transferred to Respondent's Swiss account at his direction. The Respondent provided the account number.

14. A pre-plea conference was held in the chambers of Chief Judge Maurice M. Paul prior to entry of Duboc's plea of guilty on May 17, 1994. Duboc then pled guilty in open court, and professed his complete cooperation with the government. (Ex. 10).

15. At no time prior to the entry of Duboc's plea of guilty on May 17, 1994 did Respondent, Duboc or any other person, including members of the United States Attorney's Office or Judge Paul, suggest that the stock which Respondent now claims to be his "in fee simple absolute" was anything other than an

intangible asset to be held in trust by Respondent for the purposes outlined above.

**As to Count I**

1. Count I alleges that the Respondent commingled trust funds from the sale of the Japanese Stock, the Obayashi and Pasco stock, into his personal Barnett Bank money market account.

2. These stocks, also referred to during the trial as the Japanese Stock, were entrusted to the respondent to liquidate and thereafter transmit the proceeds to the United States. (Complaint and Answer to Complaint, paragraph 23).

3. Respondent came into possession of the Obayashi and Pasco shares, sold them and deposited the funds of approximately $730,000 into his Credit Suisse Account on or about July 6, 1994. (Ex. 20, 21, 22, 31, 32, 33). The funds were then transferred into Respondent's Barnett Bank Money Market Account. The $730,000 was eventually paid to the United States Marshall on or about August 15, 1994. (Ex. 20, 21).

4. The Respondent admits that the funds were deposited in the account and that the account was neither a lawyer's trust account nor was it created or maintained by the Respondent as a separate account for the sole purpose of maintaining the referenced funds.

(Complaint and Answer to Complaint, paragraph 26).

5. In his answer to the complaint, Respondent denied that there were personal funds in the account at the time of the transfer. However this denial is refuted by the Respondent's own bank records and the accounting provided by Arthur Anderson & Co. (Ex. 20, 21).

6. Respondent argues in his trial brief that the deposit of the stock proceeds into his non-trust account was an

"inadvertent error" and that Respondent had no ulterior motive or intent. These claims are specious.

7. The evidence plainly shows that Respondent directed that Credit Suisse transfer the Obayashi and Pasco funds to his personal money market account at Barnett Bank in West Palm Beach. This was memorialized by three letters to the Swiss bank signed by the Respondent himself. (31, 32, 33). (TR 959).

8. The Referee finds by clear and convincing evidence that the respondent has violated Rule 4-1.5 (a) by failing to set up a separate account for the sole purpose of maintaining the referenced funds and also by commingling client funds with his own personal funds. Respondent's actions are aggravated by the fact that he minimizes his obvious intent and he has yet to account for the interest which accrued on the $730,000 during the time the funds were held by him in his private account.

**As to Count II**

1. Count II charges that the Respondent misappropriated sales and loan proceeds from the Biochem Pharma stock and commingled the sales and loan proceeds with his own funds.

2. Respondent makes two assertions in defense of this claim. First, he denies that he ever held the stock in trust for the benefit of has client or the United States Government. (Complaint and Answer to Complaint paragraph 27). Second, Respondent maintains that the stock was not subject to forfeiture.

3. These positions are clearly refuted by the evidence, and the Respondent's statements, assertions, claims and testimony about these matters are patently false.

The following recitation of relevant facts support this finding:

a. Following the dinner meeting described above, the subsequent "debriefings" of the defendant, and the other meetings that culminated in the entry of the plea, all parties understood that the nature of the transfer of Biochem Stock was that it be held in the form of a trust. (TR130-147, 251-260) (TR 435-481.) (TR 484).

b. Indeed, The U.S. Attorney's Office would not have permitted Duboc, a pretrial detainee on federal charges that carried a guideline sentence of life imprisonment, to transfer any assets of any description to anyone unless there was an understanding that any such assets might later be subject to forfeiture to the United States Government.

c. Even Co-Counsel Robert Shapiro and Edward Shohat support the existence of a trust arrangement that would allow a fund from which the French properties could be maintained with the ultimate beneficiary of the fund to be the United States Government. (Shapiro Deposition at page 17, lines 20-25, and page 18, lines I-3, page 43, line 24 and page 44, lines 1-4). Edward Shohat described the plea arrangement as an "excellent strategy" to benefit Duboc. (TR 521-522).

d. In addition to the U.S. Attorneys referenced above, co-counsel for Duboc and the client, Claude Duboc himself understood that the transfer of the stock was in the nature of a trust. (Ex. "H" pages 32-33).

e. Finally, and most persuasively, the presiding Judge in the criminal proceedings against Claude Duboc, the Honorable Maurice M. Paul, implicitly ratified this arrangement at the pre-plea colloquy

in chambers on May 17, 1994 and subsequently in formal proceedings when the plea was accepted.

f. Edward Shohat testified before the Referee regarding the details of the pre-plea conference. In pertinent part, that testimony was as follows:

> This trust agreement was spelled out for the Judge. . . . Well, the judge was told that the government had agreed that an asset, this stock – and I'm not sure whether the stock was identified to the Judge by name at the time – but that an asset which was anticipated to appreciate substantially in value had been chosen to be held by Lee Bailey for management of the assets, and that the purpose of that was because the assets would deteriorate substantially in value if they weren't maintained; and that Mr. Bailey was also going to assist the Court and defense counsel were going to assist the court by selling those assets for the government and trying to get the maximum value for the assets; at the same time, that the remainder value of the stock which was being segregated out would be returned to the court *at the end of the day*, and from that asset the Judge would be – a motion would be filed for a reasonable attorney's fee for Mr. Bailey and myself, and possibly Mr. Shapiro, but I don't think Mr. Shapiro had an appearance in at that point. But the attorneys would come to the court at the end of the day for attorneys' fees. [Emphasis by the referee.] (TR 520-521).

g. Respondent also confirmed and ratified that these holdings were to be in the nature of a trust. For instance, Respondent updated Edward Shohat on

the transfer of the stock to his Swiss account. (TR 517-518).

h. Respondent assured his client in January 1995 that he had charted the correct course for him. He alludes to the meeting of May 5, 1995 with Robert Shapiro and Ed Shohat wherein he was denied a visit with Duboc the following day and addresses the proposed conditions of Shohat's representation. He explains "I could have at this point rejected the silly conditions offered, applied for a healthy fee to Chief Judge Paul, and turned the balance of the Biochem stock back to the Government." (Ex. 36, page 4). Respondent also expresses his disdain for attorneys who often accept large fees and then plead their clients. (Ex. 36, page 5, footnote 16) and explains:

> You do not face the dilemma since I will be paid with Chief Judge Paul's approval – only that amount which is commensurate with the result achieved in your case, and the amount of work that went into it. Our interests are therefore in perfect alignment.

i. Further, in Respondent's letter to Judge Paul dated January 21, 1996, Respondent unequivocally confirms the agreement that the stock had been transferred to him in trust. In pertinent part, Respondent states in his letter to the Court that the reason he could not give Ed Shohat "half the money" was because:

> I told him that I had no authority to do that since I had in principal agreed to hold the funds *in the nature of a trust, with final approval for legal fees to be approved by Your Honor.*

Respondent continues to assure Judge Paul of the Judge's ultimate authority to approve fees, by stating:

> I interjected that payment of fees was to be ultimately approved by Your Honor and as I recall Your Honor merely nodded. I did this to impress on Mr. Shohat that without Court approval, any fees taken would be at the risk of disallowance. (Ex. 17, page 5).

j. Finally, in regard to the letter and in an effort 1o further protect himself and his interests, but contrary to the position he first asserted on January 12, 1996 through his partner David Schultz, Respondent advised the court in a footnote as to why he did not pay taxes on these monies derived from the Biochem stock:

> Their value on that date as calculated by the bank was $US 5,891,352.00. I viewed that as money held by me as an account in which the United States had an interest to this extent: after the payment of costs associated with the case, and fees approved by *Your Honor, any balance of the $5,891,352.00 remaining would revert to the United States.* Because of this view, I did not declare the funds to be income to myself. [Emphasis by the Referee.] (Ex. 17, page 5).

4. It was not until nearly two years after the transfer of the Biochem stock from Duboc to Respondent in trust that the Respondent first made the claim that the stock had been conveyed to him in "fee simple absolute." The precipitating factors in this tectonic shift in position were Claude Duboc's attempt to fire Respondent, a pending motion to substitute counsel for Respondent, the potential loss of what had theretofore been a "cash cow" for Respondent and most

importantly, a freeze order on all accounts associated with the stock which contained a provision requiring an accounting for all monies expended in furtherance of Respondent's trust obligations. (Ex. 1).

5. The testimony and exhibits, quantitatively and qualitatively support the establishment of a trust. Likewise, the testimony and exhibits quantitatively and qualitatively support a finding that the money was subject to forfeiture. All parties who participated in the pre-plea meetings were in agreement with this position at that time.

6. The terms of the plea and cooperation required the forfeiture of all property that had been acquired directly or indirectly by Duboc through unlawful drug trafficking activities and the identification of all assets which were used or intended to be used to facilitate the unlawful drug activities by the Defendant and any other individual. (Ex. 10, provisions 3(d) and 6).

7. The purpose of the plea agreement was to memorialize that which Respondent knew from the beginning: Everything his client owned was the product of unlawful drug trafficking activities. Indeed, Respondent wrote to Duboc "For a fellow with no legitimate source of income. . . . " (Ex. 36, page 6).

8. Respondent typed the preliminary list of assets disclosed by Duboc, which included the Biochem Stock (Ex. 7). At that time Respondent obviously knew that everything on that list had been acquired by Duboc through his drug trafficking activities.

9. In explaining the history of the case in a letter penned to Chief Judge Paul on January 21, 1996, Respondent writes that "Mr. Miller then said that his office wanted to see that I was protected on fees and expenses, including those expenses related to the

proposed liquidation efforts, and that he was prepared to transfer to my use a portion of the forfeited assets. I agreed." (Ex. 17, page 3).

10. It was only after Judge Maurice Paul ordered the return of the stock on January 25, 1996 (Ex. 2) that respondent had his Swiss attorney notify the Swiss authorities that the stock, or proceeds thereof, were obtained from or the product of illegal drug transactions. Respondent caused this to occur in an effort to thwart Judge Paul, knowing full well that the Swiss government would freeze the account. (Ex. 4, pages 2 and 3, 5, pages 7 and 8). Once again this action served Respondent's interest to avoid and not comply with a Court order.

11. The transfer of the 602,000 stock shares to the Respondent's Credit Suisse Investment Account occurred on or about May 9, 1994 (Request for Admissions and Answer, par. 1). Respondent sold shares of stock and also borrowed against the stock. The total amount derived was over $4,000,000.

12. The Respondent maintained a money market account at Barnett Bank in West Palm Beach. This account was not opened or maintained as a lawyer trust account, and on May 25, 1994, it had a balance of $7,192. (Complaint and Answer to Complaint paragraph 11), (Ex. 30). Respondent then transferred $3,514,945 in Biochem Pharma proceeds from the Credit Suisse Investment account into this money market account. (Ex. 20).

13. Of the over $3.5 million transferred to his money market account, Respondent transferred all but $350,000 into his personal checking account by December 1995. From his personal checking account, Respondent wrote checks to his private business enterprises totaling $2,297,696 and another $1,277,433 for other personal expenses or purchases.

(Ex. 5). Also, $138,946 was used by Respondent toward the purchase of his personal residence, this sum coming directly from the Barnett Bank money market account. (Ex. 5 page 3).

14. The referee is not swayed by the Respondent's argument that the lack of written agreement supports his position that no trust was established. Again he advances an inconsistent position. In point of fact, Respondent took great pride in not reducing any agreement to writing in order to protect his client at the time of trial. (TR 765-767).

15. The referee finds by clear and convincing evidence that Respondent misappropriated sales and loan proceeds derived from the Biochem Pharma, Inc. stock and commingled the sales and loan proceeds with his own funds in the money market account in violation of Rules 3-4.3, 4-8.4(b), 4-8.4(c), 5-1.1 and 4-1.15(a).

**As to Count III**

1. Count III alleges that Respondent misappropriated at least $309,861.00 of the Biochem stock sales and loan proceeds and further continued to expend funds after service and knowledge of the January 12, 1996 and January 25, 1996 order of Judge Paul.

2. On December 28, 1995 Respondent's money market account bank statement reflected a balance of $358,855.00. (Ex. 20).

3. As stated in the Paragraph 35 of the complaint and admitted by the Respondent in his answer:

> From January 12, 1996 through January 24, 1996, Respondent deposited funds [having no nexus to the Duboc representation] to his money market account in the total sum of

> $37,726.00 and disbursed funds [having no nexus to the Duboc representation] from the account in the total sum of $20,000.00, which transactions produced a January 24, 1996 closing account balance of $386,047.00, of which $350,000.00 represented sales/loan proceeds from the Biochem Pharma, Inc. stocks.

4. Respondent does not deny that approximately $3,000,000.00 was withdrawn from the Swiss account, deposited in his money market account maintained at the Barnett Bank, and used by Mr. Bailey for personal expense and "as legal fees." (Ex. 4, page 3).

5. Further, again as stated in Paragraph 36 of the complaint and admitted by Respondent in his answer, "By order of the court entered January 25, 1996, Respondent was directed, in part, to bring to the Court at a stated date, time and place:

> > . . . all shares of stock of Biochem Pharma, Inc., held by him, or by others, which represent the stock turned over to him by the Defendant, Claude Duboc, or Duboc's representatives. If the Biochem Pharma, Inc., Stock has been replaced by any other form of asset while in the possession of Mr. Bailey, then the replacement stock will be brought to this Court at the time of the above hearing.

6. Respondent continued to use the above referenced funds which had been deposited in the Barnett Bank money market account after service and knowledge of the January 12, 1996 and January 25, 1996 orders. (See also findings under Count IV).

7. Respondent asserted under oath that he did not see the January 25, 1996 orders until February 2, 1996 at

the contempt hearing before Judge Maurice Paul. However this is patently false, as the Respondent acknowledges that he studied the contents of the order fully one week *before* the February 1, 1996 hearing. (TR 939).

8. It is undisputed that from the evidence and even argued by Respondent in his trial brief (pages 4 and 5) that on January 25, 1996 Respondent disbursed funds originating from his Geneva account which he had transferred into the account on December 21, 1995.

9. Respondent transferred $290,000.00 from his Barnett money market account to his personal checking account on January 29, 1996 to cover at least nine checks dated January 25, 1996. These checks were used to pay off respondent's line of credit with Republic bank ($150,000.00), fund his business interest in the amount of $106,126.70 and his personal expense in the amount of $13,078.46. (Complaint and Answer to Complaint, paragraph 41 and admissions by respondent).

10. While Respondent argues in his brief that he had prior financial obligations to personal creditors and that the second order did not restrain him from meeting these obligations (TR 939), the Court finds otherwise. Clearly the order of January 29, 1996 specifically requires Respondent to bring with him the Biochem Pharma stock or any replacement asset. Respondent argues that the order did not encompass disbursing this cash because " . . . I see nothing in the order that prohibits distributing the proceeds of what had been a loan made against the shares, on which I was personably liable, in December, 1995." (TR 939). Clearly there were judicial restraints in place when the money was disbursed by respondent. (Ex. 1 and 2).

11. The referee finds by clear and convincing evidence that the Respondent has violated Rule 3-4.3 by engaging in conduct which is unlawful or contrary to honesty and justice, Rule 4-8.4 (b) by engaging in criminal misconduct, Rule 4-8.4 (c) by engaging in conduct constituting dishonesty, fraud, deceit or misrepresentation, and Rule 5-1.1 by misusing money held in trust.

12. The referee further finds by clear and convincing evidence that the actions of expending funds from the account after service upon and knowledge by the Respondent of the January 12, 1996 order constitute violations of Rules 3-4.3, 4-3.4(c) and 4-8.4(d)(a).

**As to Count IV**

1. Count IV alleges that the Respondent testified falsely under oath when he represented to the United States and to the United States District Court that he did not see the January 12, 1996 or January 25, 1996 orders until the morning of the civil contempt hearing before Judge Paul on February 2, 1996.

2. In his answer to the complaint, Respondent admits that in the February 1996 contempt proceedings before Judge Paul, he represented under oath to the United States and to the court that he did not, in fact, see the January 12, 1996 or January 25, 1996 orders until the morning of the hearing on February 2, 1996. Respondent denies that this testimony was false.

3. In support of this claim by Respondent, he submits his own testimony before this Court and the testimony of his associate, Ms. Toni Kennedy, as adduced at the proceedings held before the grievance committee which initiated these proceedings. (Ex. "P").

4. According to Ms. Kennedy, the January 12, 1996 order was faxed to the Respondent's law office on the date of its execution, January 12, 1996. That date was a Friday and the order was not read by anyone in the office until a staff member, Carolyn Gadigian, saw it the following day. The order was then faxed by Ms. Gadigian to the Respondent's residence in New York City. (Respondent's Answer to Request for Admissions, paragraph 11).

5. Ms. Kennedy was made aware of the order on Monday, January 15, 1996, and thereafter attempted to contact the Respondent. Ms. Kennedy eventually spoke with the Respondent over the phone late in the day on January 15th or at the latest on the morning of the 16th.

6. When Ms. Kennedy eventually spoke with the Respondent, she told him about the order. She also told him about the requirements for a complete accounting within ten days of the order and that the assets in the Swiss account were to remain frozen. Indeed, each and every material aspect of the January 12 order was discussed as between the Respondent and Ms. Kennedy on January 15.

7. Following the January 15 conversation, the Respondent eventually returned to West Palm Beach on January 18. He was in his office the entire day. He marshaled documents in support of the accounting and in advance of a meeting which he and Ms. Kennedy had with the United States Attorneys in Tallahassee on January 19.

8. According to Ms. Kennedy, the Respondent did not object to the terms of the order, but rather to the manner in which the order was obtained. In essence, Ms. Kennedy stated that the Respondent felt that the January 12 order had been obtained by the United States Attorneys from Judge Paul ex parte. Indeed,

the January 19 meeting between the United States Attorneys and the Respondent and Ms. Kennedy turned acrimonious with the Respondent accusing Assistant United States Attorney Greg Miller of obtaining the order from the Judge ex parte. Although Ms. Kennedy states that it was her understanding that the Respondent was aware of the order, she asserts that "I don't know whether he had read it or not." (Ex. "P" at page 139).

9. The Respondent reiterated his claim that he had not seen the January 12, 1996 or January 25, 1996 orders until the civil contempt proceedings were held before Judge Paul-beginning on February 2, 1996. That testimony, as well as the Respondent's denials of the allegations contained in Count IV are false for the following reasons:

   a. Respondent accused an Assistant United States Attorney of obtaining an ex parte order that he claimed he had never seen.

   b. Respondent marshaled documents in support of an accounting to be presented to the United States Attorneys at a meeting one week after entry of the order requiring the accounting.

   c. The Respondent had a conversation with Assistant United States Attorney Tom Kirwin about the terms of the January 12 order following its entry and prior to the January 19 meeting in Tallahassee.

   d. In a letter from Respondent to The Honorable Maurice M. Paul dated January 21, 1996, the Respondent plainly concedes that he knew of the terms of the order as early as January 16, 1996. (Ex. 17).

   e. Indeed, in footnote 1 of Respondent's January 21, 1996 letter to Judge Paul, the Respondent

refers to the manner, mode and method by which the order was entered, and to specific provisions of it. Respondent also characterizes his own client's law suit as "patently fraudulent" and that "Your Honor was persuaded to act on representations which are *at a minimum* subject to sharp challenge." Of course these assertions could not have been made *unless* the Respondent had seen the January 12 order.

f. The January 25, 1996 order was served upon the Respondent by fax transmission, United States mail, and personally by the U.S. Marshall's Service pursuant to the very terms of the order.

g. Respondent never appealed the entry of the order, never cried foul to Judge Paul about the ex parte order, and never complained to the Bar about the claimed unethical conduct by the U.S. Attorneys.

10. Respondent's assertions that he did not see the January 12 and January 25 orders prior to February 2 are patently ludicrous. The Court finds that by clear and convincing evidence that the Respondent lied when he testified before Judge Paul to that effect, that he lied when he denied the allegations in paragraph 45 of the complaint, that he lied when he denied the allegations contained in paragraph 46 of the complaint, and that he lied before this Court when he reaffirmed these falsehoods during his testimony before this Referee. These constitute obvious violations of Rules 3-4.3, 4-8.4(b), 4-8.4(c) and 4-3.3 (a)(1).

**As to Count V**

1. Count V alleges that by appropriating to his own uses and purposes the proceeds from the Biochem shares entrusted to him, Respondent deprived

Duboc and the United States Government of the value of the stock and the benefit Duboc sought to receive at the time of sentencing.

2. This referee has previously found that a trust was in fact established between Duboc and Respondent at the time the stock was transferred to Respondent.

3. Duboc and Respondent were comfortable with the notion that the stock would increase in value. By holding an asset that Duboc believed would increase in value, Respondent would assist Duboc at the time of sentencing because of Duboc's "extraordinary cooperation."

4. When the Biochem stock was transferred to Respondent, it was always anticipated that the increase in the stock value would sufficiently cover expenses in maintaining and liquidating Doboc's assets with a sufficient res to pay attorney fees after application and approval by Judge Paul.

5. The position taken by Respondent that he owned the stock in "fee simple absolute" and that he was entitled to not only the increase in value but to the sock as well was first brought to the attention of the United States Attorneys and Judge Paul on January 12, 1996 by Respondent's partner, David Schultz. This assertion was made in open court.

6. Respondent's position is unsupported by the evidence and has been rejected by the referee. Respondent first stated that during the initial meetings, fees were discussed in the range of one million dollars per attorney, for a total of three million. Next Respondent believed he was entitled to three million dollars by himself with $500,000 for expenses. (TR 776-779). By the time the plea was entered, roughly thirty days after Respondent met with his client, he

believed he was entitled to fees upward of six million dollars (602,000 shares of Biochem Pharma Stock). Respondent asserts, "I was told it was the stock or six million dollars, as of that date, that was mine." (TR 796).

7. There is no construction of this assertion consistent with the premise that ultimate approval and payment of fees would rest with Judge Paul. Respondent has never denied that approval of fees and expenses would have to be sought from Judge Paul. Even during the plea negotiations, when David McGee reinforced that approval of fees had to be approved by Judge Paul Respondent summed it up as follows:

> And I thought to myself, fine. When I go to Judge Paul I'm going to tell him, they gave me three and a half million and I used it to buy some stock, or they permitted me to take from my client three and a half million by agreeing to exempt it. They didn't give me anything. They never had it. And I used it to buy some stock. (TR 800).

8. Furthermore, the client would not benefit from the increase in stock, only Respondent. Under Respondent's construction of events, the conflict is apparent, because be took a financial position in the case that was contrary to his clients. The more Respondent received, the less his client would produce in this column at the time of sentencing. The conflict is blatant and obvious.

9. Put another way, if Respondent's position is accepted, Duboc would derive no benefit from any increase in stock value. Only the Respondent would

gain. This position is inconsistent with the agreement made in 1994, an agreement supposedly premised upon "extraordinary cooperation."

10. The final claim of misconduct under Count V relates to an alleged violation of Rule 4-1.8(b). This rule proscribes the use of information relating to representation of a client to the disadvantage of the client absent consent upon consultation with client. The essence of this claim relates to the Respondent's alleged self-dealing as the trustee for the French properties.

11. In a memorandum from Respondent to Raymond Duboc dated July 18, 1994, Respondent commented upon the mode and method he might employ to sell the Vallauris Property. (Ex. 48). In that memorandum, Respondent stated the following:

> Although I am ready, willing and able to sell the property if a *bona fide* offer is made, I am certainly in no hurry. Indeed, because of its breathtaking beauty, I am disposed to return here frequently until title passes to another.

13. There is no evidence that Claude Duboc ever gave his permission to Respondent to procrastinate in his efforts to sell the property so that Respondent could enjoy its "breathtaking beauty" at his whim and fancy. This Exhibit is the epitome of the kind of self-dealing that Rule 4-1.8(b) proscribes. The Bar has proven by clear and convincing evidence that the Respondent violated Rule 4-1.8(b).

**Count VI has been dismissed**

**As to Count VII**

1. Count VII alleges that the Respondent violated the rules prohibiting conflict of interest by his self-dealing, disclosure of confidential information and improper ex parte communications. The essence of these allegations can be found in letters from Respondent to Judge Paul dated January 4, 1996 and January 21, 1996.

2. With regard to the January 4, 1996 letter, in his answer to the Complaint, the Respondent denied the allegation. However, in his Request of Admissions, he admits the allegation.

3. Plainly Respondent wrote a letter to the Honorable Maurice Paul concerning a pending or impending matter. In the final paragraph of the letter authored by Respondent, he states the following:

> I have sent no copies of this letter to anyone, since I believe its distribution is within Your Honor's sound discretion." (Ex. 12).

4. Duboc appeared before the Honorable Maurice M. Paul and entered into a Plea and Cooperation Agreement on May 17. 1994. (Ex. 10).

5. Duboc pled guilty to Counts II and III of the indictment charging violations of Title 21, United States Code, Sections 952 and 963 and Title 18, United States Code, Section 1956(g).

6. As to Count II Duboc faced a maximum possible penalty of life imprisonment, a mandatory minimum 10 year period of imprisonment, a $4,000,000 fine, a 5 year term of supervised release and a $50.00 special monetary assessment.

7. As to Count III Duboc faced a maximum possible penalty of 20 years imprisonment, a fine in the amount of twice the value of the monetary instruments or funds involved in the transportation, transmission or transfer, a 5 year term of supervised release and a $50.00 special monetary assessment.

8. Pursuant to provision 3(c) of the Plea and Cooperation Agreement, Duboc agreed to complete and total cooperation.

9. Duboc had already pled guilty and was awaiting sentencing before the Honorable Judge Paul on charges carrying penalties of life in prison. His only chance for a reduced sentence would be by convincing Judge Paul that Duboc had completely and totally cooperated and had forfeited all of his assets.

10. Respondent compromised his client before the sentencing Judge by writing that:

    a. His client had pled guilty because he had no defense due to the strength of the case. It was only through Respondent's "experience and wisdom" did his client receive the advice that "was the best he could have received under all the circumstance surrounding his case." (Ex. 12; TR 534-537).

    b. His client chose this course only because it was his only option, not in a spirit of remorse or total cooperation.

    c. That his client was "a multimillionaire druggie."

    d. By consulting other counsel his client is no longer operating under the spirit of cooperation.

    e. That the new defense team had interests contrary to those of the client and the court.

11. Respondent went further and caused a second letter to be sent to Judge Paul on January 21, 1996. (Ex. 17).

12. Within this correspondence, which was copied to the U.S. Attorney's office, he threatens to seek an order to invade the attorney/client privilege to try to defeat the client's position that the stock was held in trust. (TR 537-540).

13. All of this correspondence was sent to protect Respondent's self-serving interests, control of Duboc's and the Government's money. The Court finds this to be based on the following testimony:

    a. Counsel contemplated the possibility of substantial attorney fees from the inception of representation of Claude Duboc. When Mr. Shapiro first contacted Respondent, Respondent states, "And rather than fight over this juicy case they decided to divide the pie and then divide it with me again if the case went to Tallahassee." (TR 754).

    b. The parties were gathered before Judge Paul on January 12, 1996 as a result of a motion filed on behalf of Duboc to substitute counsel.

    c. Respondent knew from talking with Duboc in the fall of 1995 that Duboc wanted the control of the money transferred to Coudert Brothers. (TR 893-894).

    d. The ex parte letter (Ex. 12) was prepared in anticipation of the hearing on Duboc's Motion to relieve Respondent as Counsel for the Defendant. Respondent wrote this letter in an effort to protect his financial stake in this case and to influence the Court to look unfavorably upon the motion to Substitute Counsel.

e. By the very term of the letter, the Respondent plainly evinced an intent to influence the presiding Judge in a brazen attempt to defeat a Motion for Substitution of Counsel. Respondent impugned the reputation of Mr. Ucinski, the attorney who Duboc was seeking to have substituted in his place and his client as well, and represented to the Court that this action was being taken under the guise of doing what was in the best interest of his client.

> Moreover, Mr. Ucinski long ago set himself up in an adversary position to myself, although he was less than candid about his machinations.
>
> Additionally, Mr. Ucinski – upon learning that I viewed a bill presented to me by him on behalf of his firm for services rendered to assist the United States in carrying out the terms of Mr. Duboc's plea agreement was patently inflated – caused a spurious complaint to be filed against me by a member of the Hong Kong Bar.
>
> Not without some pride of authorship, I believe that I set Mr. Duboc on a course which – if assiduously followed – would have caused his release at the earliest possible date, whatever Your Honor might have determined that to be. It is my fervent wish that if this noble purpose is to be confounded by lawyers who have some other agenda in mind, a clear watershed be documented at this juncture of the case.

All this was done with the ludicrous presumption that the Respondent's opinion, as the potentially displaced attorney, would be of any relevance or benefit to anyone.

14. The Referee finds by clear and convincing evidence that there was an improper communication in violation of Rule 4.3.5(a). It is uncontroverted that at the time the letter was sent, there were pending matters before the Honorable Maurice Paul, i.e., the sentencing of Duboc and the motion for substitution of counsel.

15. The referee finds by dear and convincing evidence that Respondent violated the Rules 4-3.5(a) and 4-3.5(b) by attempting to influence a judge and by communicating as to the merits of the case with the judge before whom the proceeding was pending. Respondent violated Rules 4-1.6(a) by revealing information relating to representation of a client and 4-1.8(b) by revealing information to the disadvantage and detriment of his client.

III. *Recommendation as to Whether or Not the Respondent Should Be Found Guilty*:

As to each count of the complaint I make the following recommendations as to guilt or innocence:

**As to Count I**

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Rule 4-1.15(a) by having personal funds in his money market account when he directed the transfer of the $730,000 from the liquidation of the Obayashi and Pasco stock from his Credit Swiss Account to his personal Barnett Bank Money Market Account.

**As to Count II**

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations:

3-4.3 (a lawyer shall not engage in conduct which is unlawful or contrary to honesty and justice);

4-8.4(b) (a lawyer shall not engage in criminal misconduct);

4-8.4(c) (a lawyer shall not engage in conduct constituting dishonesty, fraud, deceit or misrepresentation);

5-1.1 (money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose);

4-1.15(a) (which mandate that a lawyer hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation, and that in no event may the lawyer commingle the client's funds with those of the lawyer) by misappropriating sale and loan proceeds from the Biochem stock and by commingling the sales/loan proceeds into his own money market account.

**As to Count III**

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations:

3-4.3 (a lawyer shall not engage in conduct which is unlawful or contrary to honesty and justice);

4-8.4 (a lawyer shall not engage in criminal misconduct);

4-8.4 (a lawyer shall not engage in conduct constituting dishonesty, fraud, deceit or misrepresentation);

5-1.1 (money or other property entrusted to an attorney for a specific purpose, is held in trust and must be applied only to that purpose); and

4-3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists), to wit:

by misappropriating the sale and loan proceeds from the Biochem stocks and continuing to expend funds from his Barnett Bank money market account after service and knowledge of the orders of Judge Paul.

**As to Count IV**

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations:

3-4.3 (a lawyer shall not engage in conduct contrary to honesty and justice); 4-8.4(b) (a lawyer shall not engage in criminal misconduct);

4-8.4(c) (a lawyer shall not engage in conduct constituting dishonesty, fraud, deceit or misrepresentation); and

4-3.3(a)(1) (provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal), to wit: by stating under oath to representatives of the United States and to Judge Paul that he did not see

the January 12, 1996 and January 25, 1996 orders until February 2, 1996.

**As to Count V**

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations:

4-1.7(b) (a lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation may be materially limited by the lawyer's own interest);

4-1.8(a) (a lawyer shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses); and 1.8(b) (a lawyer shall not use information relating to a representation of a client to the disadvantage of the client).

**As to Count VI**

This count has been dismissed by The Florida Bar.

**As to Count VII**

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations:

4-3.5(a) (a lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the Rules of Court;

4-3.5(b) (in an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the cause with a judge or an official before whom the proceedings are pending);

4-1.6(a) (a lawyer shall not reveal information relating to representation of a client);

4-1.8(b) (a lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation);

4-1.8(a) (a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, adverse to a client), to wit: by sending two letters to the judge concerning an unsentenced client that contained both information that was detrimental to his client and to protect his financial interest in continuing to represent his client.

IV. *Recommendation as to Disciplinary Measures to be Applied*:

I recommend that the Respondent be disbarred from the practice of law in Florida.

In making this recommendation, the referee has reviewed the applicable rules regulating the Florida Bar, the Rules of Discipline, the Standards for Imposing Lawyer Sanctions and the case law cited by the parties and otherwise applicable to these proceedings.

These authorities clearly indicate that, even without consideration of any aggravating factors, when there is conduct such as that proven by the Bar in this case, disbarment is appropriate. Those authorities, as more particularly

referenced by the Bar in its post trial memorandum, specifically indicate that disbarment is required under the following circumstances:

1. Commingling of Client Funds which were to be held in trust with the Lawyer's personal funds and failure to maintain the client funds in a specifically identified Lawyer's Trust Account.

2. Misappropriation of Client trust funds and failure to maintain said funds in a separate trust account.

3. Misuse and misappropriation of client funds and disobedience of a court order and dishonest conduct before a tribunal.

4. Violation of the rules prohibiting dishonesty and false statements to a tribunal.

5. Violation of the rules proscribing conduct which creates a conflict of interest with the client.

6. Disclosure of Confidential communication without authorization of the client.

7. Use of information obtained during the course of representation to the disadvantage of the client.

Before the Referee's discussion of aggravation and mitigation, the Referee notes that any of the violations of the rules regulating the Florida Bar which have been proven by the Bar as set forth above, would singularly warrant the recommended discipline. Collectively, the numerous violations, all of which are serious and egregious, plainly warrant permanent disbarment.

A. *Aggravating Factors*

The Court finds the following aggravating factors to be present under Standard 9.22 of the Florida Standards for Imposing Lawyer Sanctions.

9.22(b) dishonest or selfish motive;

9.22(c) a pattern of misconduct;

9.22(d) multiple offenses;

9.22(f) submission of false statements;

9.22(g) refusal to acknowledge the wrongful nature of conduct; and,

9.22(i) substantial experience in the practice of law.

The Respondent has been a member of the Florida Bar since 1989 and was admitted to the Massachusetts Bar in 1960. According to the Respondent, he is a member of the The Supreme Court of the United States, every circuit in the United States, the Tax Court, the Federal Court of Claims, and as of the time of the hearing was admitted in North Carolina and California pro hac vice on two cases. (TR 740).

Aggravation is apparent under Standards 9.22(b), (c) and (d) as set forth above. Aggravation is also apparent under Standard 9.22(f) insofar as the proceedings before Judge Paul are concerned. The Court also notes at this point that although it was neither charged nor argued by the Bar, the Respondent testified falsely in this disciplinary proceeding, and this serves as further aggravation under Standard 9.22(f).

Aggravation under Standard 9.22(g) is also plainly evident to the Referee. At no time during this disciplinary proceeding did the Respondent, either personally or through Counsel, acknowledge the wrongful nature of any aspect of his behavior at any time relevant to these proceedings.

The sole exception to this finding is the equivocal characterization of the Respondent's conduct in regard to Count I of the complaint. In that instance, the Respondent argued that his actions were an "inadvertent error shared by all parties to the transaction.

The Court notes parenthetically that Respondent is responsible for compliance with the Rules Regulating the Florida Bar, and the U.S. Government has no responsibility to stop him from engaging in conduct which he knows is proscribed. It goes without saying that Mr. Duboc bears no responsibility for Respondent's transgressions.

Aggravation under 922(i) will be discussed in the context of the Respondent's personal history and past disciplinary record.

Counsel for the Bar sought to introduce into evidence three exhibits numbered (53, 54 and 55), as substantive evidence in support of the claims of ethical improprieties on the part of Respondent. The Referee disallowed its admission for that purpose for reasons which appear on the face of the record. In sum, the Referee found that the events in what has been referred to as the "McCorkle Matter" took place after those giving rise to those proceedings; therefore they are of no relevance to Respondent's state of mind at the time he represented Claude

Duboc. Second, the Magistrate Judge in the McCorkle Matter, Hon. James G. Glazebrook, relied on the findings of Judge Paul in Duboc to support his finding of civil contempt in McCorkle.

Of course the ruling of the Referee in regard to the Bar's purpose in seeking admission of exhibits 53, 54 and 55 is not germane to the Referee's analysis of whether Respondent's conduct in McCorkle serves as aggravation under Standard 9.22. Plainly, a finding of contempt by a sitting Judge is an aggravating factor which this Referee must consider. Without going into unnecessary detail, suffice it to say that the Referee finds that Judge Glazebrook's recommendation of civil contempt is plainly supported by the exhibits referenced above. That this should serve as aggravation is obvious and indisputable.

V. *Personal History and Past Disciplinary Record:*

After the finding of guilt and prior to the recommendation of discipline to be imposed pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: 67 years

Dated admitted to Bar: 1989

Prior disciplinary convictions and disciplinary measures imposed therein:

Respondent was censured in 1970 in the State of Massachusetts and Suspended for one year for permission to appear pro hac vice, as listed below:

1. Censured September 16, 1970 by Justice Kirk, Commonwealth of Massachusetts, Supreme Judicial Court. (Ex. 52).

2. Suspension for one year of privilege of applying to permission to appear pro hac vice, Judge Morris Pashman sitting as a Master for the Supreme Court of New Jersey and later ratified by the Supreme Court of New Jersey *In the Matter of F. Lee Bailey*, 273 A.2d 563 (N.J. 1971). (Ex. 51).

While the Court finds these disciplinary actions to be too remote in time to serve as aggravation under Standard 9.22(a), the Court finds that the characteristics noted by those justices shed some light on the behavior addressed in this report.

In concluding his findings in his Order of September 16, 1970, Justice Kirk writes of the Respondent:

> [H]e is unwilling to concede that he could have been wrong; he believes that he alone should decide if "special circumstances" exist to justify a departure from the established norms of conduct; he studies rules and judicial orders with a purpose of evasion rather than with a will to comply with their spirit for the general good. These attitudes bespeak a self-esteem of such proportions as to challenge description. From it, there has evolved, as designated counsel have suggested, consciously or unconsciously, a philosophy of extreme egocentricity for the defense of criminal cases involving the use of news media. . . .

Similarly, the Supreme Court of New Jersey writes of the Respondent's Conduct:

> This highly improper conduct cannot be allowed to pass without discipline. It indicates a state of mind, or so-called philosophy, that treats as justified, a course of action by a lawyer completely foreign to and destructive of our system of justice and the true responsibilities of an advocate.

In sum, as Justice Kirk noted in his opinion thirty years ago:

> All things considered, disbarment as a disciplinary measure would not be essentially wrong. But it would close the door to possible reconsideration of values and standards by one who is still young in the profession. Censure, on the other hand, may prove to be of doubtful efficacy. It is for the respondent to resolve that uncertainty by his future conduct.

Unfortunately, that uncertainty has been resolved against the Respondent. Through the conduct exhaustively described above, it is plain that very little has changed in the thirty years since Justice Kirk noted that the Respondent " . . . studies rules and judicial orders with a purpose of evasion rather than with a will to comply with their spirit for the general good."

Indeed, since the disciplinary actions noted above, Chief Judge Paul and Magistrate Judge Glazebrook and this Referee have had numerous opportunities to assess and characterize the demeanor and credibility of the Respondent. In each instance, the various Judges and Justices have employed circumspect and eloquent ways of saying the same thing: "The Respondent is a liar." This Referee concurs.

Perhaps the most salient expression heard by the Referee throughout these proceedings was uttered by Mr. Shohat when he unequivocally stated that attorney's fees were subject to an approval by Judge Paul "at the end of the day." "At the end of the day," the Respondent has forfeited his privilege to practice law in the state of Florida. Frankly, it is difficult for this Referee to conceive of a more egregious set of circumstances than those which Mr. Bailey has brought upon himself.

VI. *Statement of Costs and Manner in Which Cost Should be Taxed*:

The Bar neither submitted nor argued for the imposition of a specific dollar amount of cost that should be taxed against the Respondent. However, in light of the discipline recommended above, and should the Supreme Court concur, all reasonable cost incurred at the grievance committee level, all administrative cost and other ancillary cost associated with the prosecution of this disciplinary action should be taxed against Respondent.

Dated this ___ day of ___, 2000.

CYNTHIA A. ELLIS
Referee

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above Report of Referee has been served on F. Lee Bailey, Esq., 1400 Centrepark Blvd., Suite 909, West Palm Beach, Florida 33401-7412; Donald Beverly, Esq., 823 North Olive Avenue, West Palm Beach, Florida 33401; Debra J. Davis, Esq., The Florida Bar, Suite C-49, Tampa Airport Marriott Tampa, Florida

33607; David R. Ristoff, Esq., Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott, Tampa, Florida 33607; Terrance Edward Schmidt, Esq., 1301 Riverplace Blvd., Suite 1818, Jacksonville, Florida 32207-9022; and John Anthony Boggs, Esq., The Florida Bar, 650 Apalachee Pkwy., Tallahassee, Florida 32399-6523, this ___ day of ___, 2000.

_____
Referee

IN THE SUPREME COURT
OF FLORIDA

THE FLORIDA BAR,
Complainant,
vs.
F. LEE BAILEY,
Respondent.
_____/

CASE NO. SC 96,767
T.F.B. Number
1996-51,085(15B)
1997-50,110(15A)

**F. LEE BAILEY'S MOTION FOR LEAVE TO SUPPLEMENT THE RECORD WITH THE TRANSCRIPT OF THE TESTIMONY IN THE UNITED STATES COURT OF FEDERAL CLAIMS IN *F. LEE BAILEY V. UNITED STATES*, AND TO FILE, WITHIN 20 DAYS OF THE ORDER GRANTING THIS MOTION, A SUPPLEMENTAL BRIEF OF NO MORE THAN 20 PAGES, IDENTIFYING TESTIMONY IN THAT PROCEEDING THAT IS RELEVANT TO THE FACTUAL ISSUES IN THIS CASE**

Oral argument was held in this case on August 30, 2001. At the argument, some members of the Court inquired about the status of the recently concluded (August 2, 2001) proceedings in the United States Court of Federal Claims case styled *F. Lee Bailey v. United States*, Case No. 96-666c. That case is a breach of contract case brought by Mr. Bailey against the United States, and the same facts are in issue in that case as in this case: what were the circumstances under which the Biochem Pharma stock was transferred to Mr. Bailey and was that transfer "in trust."

Those issues are at the heart of the case brought by the Florida Bar against Mr. Bailey. Because United States

Court of Federal Claims Judge Marian Horn will be rendering an opinion based on the same facts which form the foundation of the Bar proceeding and because the transcript in the Court of Claims contains the fully developed testimony of important federal government witnesses who were unavailable to Mr. Bailey in the Bar proceeding, this Court should be apprised of that testimony before deciding the instant case. Given the harsh sanction sought by the Bar, and the high substantive evidentiary standard by which the evidence is to be judged (clear and convincing evidence), due process of law supports this request to supplement the record with the transcripts of the United States Court of Federal Claims proceeding.

Two examples of the importance of this Court being fully informed of the Court of Federal Claims testimony are the comments by Judge Horn at the conclusion of the evidence in that case, and the testimony of Thomas Kirwin, the Assistant United States Attorney who maintained the only notes about the May 17, 1994 proceeding before Judge Paul.

Judge Horn spoke of the "inconsistencies" in the testimony [Exhibit A, August 2, 2001 Transcript Excerpt, p. 1802); the fact that "no other proceeding and no other presiding official has had the opportunity that I've had here to explore this issue as fully as I've had. . . . " (*id.* at 1808); and that "assess[ing] the credibility of witnesses" presented "real issues" (*id.* at 1811-12). In that regard, she said:

> I found the only person who testified with any lawyer-like demeanor was Mr. Bailey.

> That doesn't mean he's got a winner here, but it was remarkable how each of the other key major criminal practitioners who got up here, and I'm talking about the private practitioners now and some of the public ones too . . . used phrases, used passion, got pretty agitated as they were testifying.

Exhibit A, p. 1812. She continued, that "[t]he witnesses stack up in different ways, depending on which side you're on." *Id.* at 1817. One witness she singled out was Thomas Kirwin, who testified as Mr. Bailey's witness:

> I found Mr. Kirwin, of all of the Assistant U.S. Attorneys, to be the most credible, which makes him a vital player in this multi-action play. He was not comfortable on the stand, but I felt that he was trying to be forthright and trying to be honest about what he said. He didn't like where he was. You could see that. He was not enjoying this opportunity to testify, but he appeared to me to be very, very straightforward.

Exhibit A, p. 1818.

Mr. Kirwin testified, *inter alia*, about the transfers of the Biochem Pharma stock:

> Q. – there's no reference to trust in that document or trustee; is that correct?
>
> A. That's correct.
>
> Q. Was there any discussion when that document was drafted that the term trust should be included, in that document, 1-5?
>
> A. The Biochem Pharma. No, I don't remember any discussion about inclusion of the term trustee in that document.

Exhibit B, Transcript Excerpt, pp, 524-25.[1] Nor did Mr. Kirwin "remember hearing the word trust," "I don't remember the word trust being used" at the in-chambers

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[1] At the August 30, 2001 oral argument, a member of this Court asked why the government "would allow a transaction to go down like this without more express agreements in writing or evidence of what the actual transaction was," and Bar counsel's answer was: "I think the best explanation, it was purposeful. I think all of the parties did not want to have a paper trail." Mr. Kirwin's answer was much different:

> A. The question of whether or not something should be written was not raised. It wasn't like it said "oh, no, let's not put anything in writing." The issue of whether or not anything should be in writing was just never raised by anybody, other than you know, we talked about the plea agreement and that would be, you know, a written document. But you know, in terms of writing down what Mr. Bailey could and couldn't do, should and shouldn't do, what the United States Government could and couldn't do and should and shouldn't do, that issue never came up.

Exhibit B, pp. 526-27. The dichotomy of views between Bar counsel's response and the above quoted testimony is another example of why the Court should have *all* the testimony prior to decision making, as is the Court of Claims testimony of AUSA Gregory Miller, who said "if the stock became valueless, he [Bailey] would have no other pool to get his fees from" and "I did make it clear to him that was the only stock at that time, the only funds we were making available for paying his fees" (Exhibit C, pp. 1625-1626), which leaves no doubt that the stock incorporated a fee. Indeed, Miller testified that had Bailey taken the "cash option [of "up to $6 million" (p. 1570)] that was on the table in front of him he had absolutely no risk . . . they would have the money for the fees, the attorney's fees and have it for upkeeping the property." *Id.*, at 1627.

conference with Judge Paul on May 17, 1994, nor did his notes reflect any "trust" mentioned to Judge Paul. Exhibit B, pp. 590-95, 607. Asked whether Mr. Bailey "was restricted in the timing of his selling the stock," Mr. Kirwin said:

> A. My understanding was whatever Mr. Bailey needed to do with the stock; he could do with the stock. And always the capstone on that, and maybe that's why I'm thinking at the end of this thing, Mr. Bailey's going to have to account for what he did to Judge Paul, and you know, God bless him for having to do that.

Exhibit B, pp. 620-21, Whether Mr. Bailey is to be blessed or blamed depends on how one views *all* the evidence under the clear and convincing evidence standard.

## CONCLUSION

It is respectfully submitted that these brief examples underscore the importance of this Court having the benefit of the testimony in *F. Lee Bailey v. United States*. The Referee in the Bar proceeding called Mr. Bailey a liar. *See*, Amended Report of Referee, July 24, 2000, p. 23. That condemnation directly preceded the Referee's closing remark: "Frankly, it is difficult for this Referee to conceive of a more egregious set of circumstances than those which Mr. Bailey has brought upon himself." *Id.*, p. 24. Those are harsh words, but they are not the only view of Mr. Bailey.

The United States Court of Federal Claims Judge had a different view of Mr. Bailey, and Mr. Kirwin, whose

testimony was advanced by Mr. Bailey as his witness, was deemed credible too. We will not know the outcome of the Court of Claims case for several months, but consistent with the caution which should be exercised in these serious proceedings, it would be prudent and fair for the Court to have complete testimony regarding the government's and Bailey's understanding of the "unprecedented arrangement" which is the crux of this case. *See*, Exhibit A, p. 1816.

If the Court grants this Motion to Supplement the Record, F. Lee Bailey requests that he be permitted to file, within 20 days, a Supplemental Brief limited to 20 pages to identify the relevance of the supplemented record to the instant proceeding.

Respectfully submitted,

/s/ Bruce Rogow
BRUCE ROGOW
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DON BEVERLY, P.A.
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Counsel for F. Lee Bailey

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing (including the transcript served on Ms. Davis only) was forwarded by *FedEx* to the following counsel of record this 12th day of September, 2001:

DEBRA J. DAVIS, ESQ.,
The Florida Bar
Suite C-49,
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JOHN A. BOGGS
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/s/ Bruce Rogow
BRUCE ROGOW

**Supreme Court of Florida**

MONDAY, OCTOBER 29, 2001

**CASE NO.:** SC96767
Lower Tribunal Nos.: 1997-50,110(15),
1996-51,085(15B)

THE FLORIDA BAR vs. F. LEE BAILEY

Petitioner(s) Respondent(s)

F. Lee Bailey's Motion for Leave to Supplement the Record with the Transcript of the Testimony in The United States Court of Federal Claims in *F. Lee Bailey v. United States*, and to File, Within 20 days of the Order Granting this Motion, A Supplemental Brief of No More than 20 Pages, Identifying Testimony in that Proceeding that is Relevant to the Factual Issues in this Case is hereby denied.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy

Test:

/s/ Thomas D. Hall (SEAL)
Thomas D. Hall
Clerk, Supreme Court

kb
Served:

P. MICHAEL PATTERSON
DEBRA JOYCE DAVIS
DAVID ROBERT RISTOFF
RUSSELL S. BOHN
F. LEE BAILEY
✓BEVERLY A. POHL
DON BEVERLY
BRUCE ROGOW
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HON. CYNTHIA ELLIS, JUDGE
JOHN ANTHONY BOGGS

LAW OFFICES
**F. Lee Bailey**
**823 North Olive Avenue**
**West Palm Beach, Florida 33401-3709**
(561) 655-4406
FACSIMILE (561) 655-4820

April 6, 2000

**VIA U.S. MAIL**
**VIA FACSIMILE**
**(202) 616-8202**

James K. Robinson,
Assistant Attorney General
Criminal Division
Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Attention: Terry Henry
Civil Division

Dear Mr. Robinson:

As co-counsel with Donald Beverly in the case of *The Florida Bar v. F. Lee Bailey* which is slated for trial on May 30, 2000, I hereby request that we be permitted to take the deposition of Mary Lee Warren. The grounds for this request are as follows:

1. On April 26, 1994, my client, Claude Duboc, caused to be transferred to me, in my personal not trust account at Credit Suisse in Geneva 602,000 shares of Biochern Pharma stock freely tradeable. This was done pursuant to an agreement by the government that any claim it might have to try to forfeit that stock to the United States would be complicated by its Canadian origins, that Canada might have a superior claim to the

stock and that an agreement between myself, Duboc and the government was in the best interests of all.

2. I was told that although the stock was to secure my fees and costs and those of other counsel, if the stock should depreciate or collapse that was a risk I was assuming, and that there would be no other source of fees that the government could promise.

3. After I agreed to these terms the government caused to be typed a letter, signed by Claude Duboc and dictated by him instructing UBS Bank, Luxembourg, to transfer the shares to my account in Geneva. This same letter transferred $3,500,000+ to a moon account (in Panama City, Florida), which is a cover for the DEA. Originally I was to get the cash and the government was to take the stock, however it was explained to my client in my presence that the government could not own stock and would have to sell it all the next day, perhaps depressing the share value severely. At the request of the government and myself I agreed to take the shares instead of the cash as the relevant document indicates. Thereafter I made personal loans against the stock and spent large sums – pursuant to a contract with the government – to maintain, reserve and eventually liquidate the real and personal assets of Duboc, forfeited with his consent to the United States.

4. When my margin limit (25%) was being reached, I sold 25% (150,000) of the stock which the government well knew, in order to diminish my personal liability and pay down my credit line with Credit Suisse which held the stock as collateral.

5. When the stock began to rise in value late in 1994, I made further loans against it ending in April, 1995, having been advised that there would be a "run" on the stock depressing its value. I sold an additional 52,000 shares leaving a balance of 400,000 shares.

6. On January 11, 1994, the government discovered that the shares had gone from $9.00+ to $45.00+ in value and demanded that I turn over all the profits to the government.

7. When the forfeitures were made my client at the request of the government, assisted the government in violating any number of treaties by cheating other countries (Singapore, Canada, France and Luxembourg) out of their fair share of forfeited properties.

8. The government brought an action against me to force me to turn over the shares and incarcerated me for 44 days while I raised the $2,300,000 necessary to free up the shares by paying off loans against them which I had made based on my entitlement to the substantial profits.

9. The government's basis for its claim involved two prongs; (1) that I had received the shares in trust with a promise to accept the losses if they occurred; to deliver any profits to the government, a clear violation of the prohibition against "parking" stock; and (2) that I had agreed that the stock was a forfeitable asset, to be forfeited in the future at the government's whim, a totally unlawful agreement had it been made. These claims, I contend were fabricated shortly after January 11, 1996.

10. During what some have termed a "trial" on February 2nd & 3rd, 1996, it was disclosed that a memorandum had been created by the Office of the United States Attorney for the Northern District of Florida and transmitted to Mary Lee Warren in the Department of Justice, some time on or about May 17, 1994, when Duboc pleaded guilty to the charges against him. My counsel sought this document, the government resisted, and United States District Judge Maurice M. Paul ruled in their favor.

11. In September, 1996 I filed suit against the government in the United States Court of Federal Claims for breach of contract on numerous grounds with which I assume you are familiar; if not please contact Terry M. Petrie of the Commercial Litigation Branch who is handling that case.

12. My counsel in that case requested from the Hon. Marion Blank Horn that we be made privy to the document described above which she published in part and redacted in pan.

13. I have been charged by The Florida Bar with breaching the rules governing the use of trust funds, on the ground that the government gave me the shares in trust even though there is no document remotely suggesting such a transaction and even though no lawyer not confined to a mental hospital would ever agree to "park" stock, risk all downside movement and give the government any resulting profits.

14. I think that the above recitation should make clear our need to depose Mary Lee Warren in this action. The government seeks disbarment, Florida law clearly

protects lawyers thus attacked with a full panoply of due process rights, and the right to discovery where the real prosecutor is the United States government is fundamental.

15. We are seeking to learn from Mary Lee Warren whether she knew about or approved; (a) the "parking" of stock by the government, a felony under federal law; (b) the formation of an illegal process to accomplish that "parking"; (c) the formation of a trust for the purpose of committing a crime; (d) the formation of a trust which was totally unenforceable under Florida law due to the statute of frauds; (e) assisting a client in transferring to a lawyer a "forfeitable" asset without the necessary Justice Department approvals; (f) the conduct of the government in causing to be deposited in a Swiss bank account drug proceeds in violation of Swiss law and its treaty with Switzerland respecting money laundering; (g) the conduct of the government in cheating Singapore, Canada, France and Luxembourg out of their fair share of drug proceeds generated or located in their respective countries; and (h) what other members of the Justice Department were made privy to any contract which may have been formed between the undersigned and the Office of the United States Attorney for the Northern District of Florida.

16. I have reviewed 28 CFR § 16.21, 16.22, and 16.26. I hope that the requirements thereof are satisfied herein; if it is your view that they are not, please notify me promptly so that I may alert Judge Ellis, the Referee in the instant litigation, of my inability to flush out my defense to the charges in question, whereafter I will seek to have the case against me dismissed by the Supreme

Court of Florida on the ground that the government, having fabricated the wildest story in the history of jurisprudence now refuses to have its minions to be properly questioned about their doings with respect to these alleged arrangements. You may call me or Donald Beverly, Esq. at (561) 655-4406, at any time and my secretary, Sue Corwin, will find us forthwith and your call will be returned.

As you can see, with the trial looming time is of the essence. I hope you will act very promptly.

Very truly yours,

F. Lee Bailey

FLB:sc

SWORN TO and subscribed before me this ___ day of April, 2000, by F. Lee Bailey, who is personally known to me.

_____

Notary Public, State of Florida at Large
My Commission Expires:

[LOGO] **U.S. Department of Justice**

Civil Division

Tel: (202) 307-6288
Fax: (202) 514-8640

*Washington, D.C. 20530*

June 23, 2000

BY FACSIMILE AND U.S. MAIL

Mark L. Horwitz, Esq.
Horwitz & Fussell
17 East Pine Street
Orlando, Florida 32801

Re: F. Lee Bailey v. United States;
Fed. Cl. No. 96-666C

Dear Mr. Horwitz:

This letter responds to your letter dated June 20, 2000. Pursuant to the directions issued by the Court at the Monday, June 19, status conference, you describe the topics or matters you plan to inquire by deposition of Mary Lee Warren, Deputy Assistant Attorney General, Criminal Division, in addition to the authority to contract issue which was previously raised. The additional topics mentioned in your letter are Ms. Warren's knowledge regarding:

> " . . . the conduct of Mr. Bailey in relation to his efforts in the liquidation, preservation and repatriation of assets in relation to Mr. Duboc[;]"

and

> " . . . the assets and/or Mr. Bailey's efforts on behalf of the government, and any benefits flowing to the Government as a result of Mr. Bailey's efforts."

Initially, several comments are appropriate. First, we note that your reference to "assets" is vague and does not discriminate between those assets of Mr. Duboc which were handled by Mr. Bailey and those which were not. As you know, the government previously has objected to plaintiff's discovery requests that seek information about Mr. Duboc's assets which were not handled by Mr. Bailey.

Similarly, you make no distinction about whether this inquiry about assets would relate to a period in time before or after Mr. Bailey was no longer Mr. Duboc's attorney. The government has objected upon that ground as well to plaintiff's discovery requests. We are willing, as you know, to provide information regarding matters which occurred after Mr. Bailey was no longer Mr. Duboc's attorney provided it is otherwise relevant. Your letter, however, does not make that distinction.

Finally, with regard to your intention to depose Ms. Warren about "benefits," your letter subsequently states that "[i]n discussing the issues of benefits to the government, obviously the government's receipt of assets and sharing of those assets with foreign governments has an impact on the benefits realized by the government." This formulation amounts to an attempt to get through the back door what you cannot get through the front door. Specifically, as was mentioned at the June 19 status conference, plaintiff desires to inquire into whether the United States shared proceeds with foreign governments because of its belief that the United States Attorney's

Office for the Northern District of Florida used Mr. Bailey to avoid obligations under international treaties. This matter is plainly irrelevant to the issues in this litigation, and we have previously objected. Your formulation in your June 20 letter clearly affords sufficient latitude to inquire in this regard. Moreover, plaintiff is fully aware that the United States had approached officials of the government of France about Mr. Duboc's assets within two weeks of Mr. Duboc's entry of a guilty plea in May 1994.

Notwithstanding these problems with your description of the areas you wish to inquire of Ms. Warren, without elaboration, you contend that these matters are "relevant and may lead directly to admissible evidence or may develop facts which when explored will lead to relevant evidence." Specifically, and again with no or little elaboration, you indicate these matters relate to the issues of "authority to contract, as well as the actual or implied contract with the government, and benefits flowing to the government."

We disagree. The standard is whether inquiry into these matters (the "assets," what Mr. Bailey did with regard to Mr. Duboc's assets, "benefits flowing to the government as a result of Mr. Bailey's efforts") are relevant or are reasonably calculated to lead to the discovery of admissible evidence. The principal issues in the litigation are what were the terms of the arrangement, if any, between Mr. Bailey and the United States, specifically with respect to the disposition of the Biochem Pharma stock, and the question regarding the authority to contract. None of these areas that plaintiff wishes to inquire of Ms. Warren are relevant to those principal issues nor

likely to lead to the discovery of evidence which will make either more or less likely any of the facts in dispute about these principal issues. That is, inquiry into what happened with various assets (aside from Biochem Pharma stock), what Mr. Bailey did with the assets to repatriate them, and what "benefits flow[ed] to the United States" because of Mr. Bailey's efforts do not relate nor shed any insight into what the parties understood was to happen with the Biochem Pharma stock or the authority to contract issue.

Finally, your reliance upon *Janowsky v. United States*, 133 F.3d 888 (Fed. Cir. 1998) (trial court erred in dismissing implied-in-fact contract claim without considering whether the agency ratified the proposed contract by allowing a sting operation to continue and by receiving benefits from it) relates to the issue of contract authority. It does not add to the relevance of the matters discussed above. Plaintiff has been able, and may continue, through other depositions to establish what proceeds the United States realized from Mr. Duboc's assets. Nor has the United States ever suggested it has not received proceeds from Mr. Duboc's assets. No reason exists to further inquire of Ms. Warren, other than that this represents plaintiff's use of a "benefits" Trojan horse to ask what proceeds have been shared with foreign governments which is irrelevant to this litigation.

Please call me if you have any questions.

Sincerely,

/s/ Terry M. Petrie
by Susan [Illegible]
TERRY M. PETRIE
Attorney
Commercial Litigation Branch

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

THE FLORIDA BAR,
Complainant,
vs.
F. LEE BAILEY,
Respondent.
_____/

CASE NO. SC96,767
TFB NO.
1996-51,085(15B)
1997-50,110(15B)

## EMERGENCY MOTION FOR ABATEMENT OR STAY

Respondent, F. LEE BAILEY, by his undersigned counsel, hereby respectfully requests this Court to grant a stay or abatement of the disciplinary proceeding presently scheduled to commence in this case on May 30, 2000 in the Circuit Court of Collier County before the Honorable Cynthia A. Ellis, Referee, as follows:

### Introduction

The Complaint in this Florida Bar ("Bar") disciplinary proceeding was filed on or about October 15, 1999 (AC at 21), and trial is presently scheduled to begin on May 30, 2000 (AA).[1] On May 15, 2000, Respondent filed a Motion to Dismiss or, in the Alternative, to Abate Disciplinary Proceedings Pending Conclusion of Respondent's Litigation in Court of Federal Claims (AB). The motion was heard yesterday, May 23, 2000, and denied (AE at

[1] "A" denotes Respondent's Appendix; reference to appendix items is by letter and internal pagination. All emphasis in this motion is supplied, unless otherwise indicated.

35-6). Respondent now requests this Court to enter a stay or an abatement of the trial.

The Complaint in this case (AC) presents seven allegations; the sixth allegation was dismissed with prejudice following the Bar's filing of a Notice of Abandonment (AA at 2). At the heart of most of the allegations is the nature of the transfer of 602,000 shares of Biochem Pharma stock from Claude Duboc to Respondent while Respondent served as Duboc's counsel in a criminal prosecution in the United States District Court for the Northern District of Florida. The Bar contends that Respondent accepted the transfer as part of an oral trust agreement, whereby Respondent was to serve as trustee of the fund on behalf of the United States. Respondent's contention consistently has been that no trust was created, and that the stock was transferred to him in fee simple. The facts out of which this dispute arose are recited in detail in the first five pages of an Opinion filed on January 21, 2000 by the Honorable Marian Blank Horn, Judge of the United States Court of Federal Claims, Case No. 96-666 (A5).[2]

I.

The Court of Federal Claims case was filed by Respondent as Plaintiff against the United States on October 22, 1996, and in her Opinion Judge Horn denied the government's motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim upon which

---

[2] Due to the emergency nature of this motion, Respondent will rely on the recitation of facts in that Opinion, which this Court is respectfully requested to review.

relief may be granted. As the Opinion recites (AD at 5), Respondent's court of claims complaint is in two counts.

The first alleges that, after the stock rose dramatically in value, the Defendant breached an express contract with Respondent by taking action to deprive him of the stock which he maintains was transferred to him in fee simple as consideration for his efforts to repatriate property, owned by Duboc and subject to forfeiture, worth between $50 and $100 million, much of which was situated overseas (AD at 12). The second count alleges that the action of the government's agents created an implied-in-fact contract which was breached by the government's actions to deprive Respondent of the stock, damaging him financially.

The government's motion to dismiss was denied on a variety of grounds. Among other things, Judge Horn ruled that Respondent's contract claims were neither at issue nor decided in the forfeiture proceeding in the criminal case (AD at 22-3), and that in fact the remedy which he seeks in the court of claims was unavailable in the action in the federal district court (AD at 29). Respondent filed the court of claims action after determining that the proper nature of his claim was not that of a third party in the forfeiture proceeding, but rather a breach of contract action against the government (AD at 17). Judge Horn observed:

> Mr. Bailey's services in the repatriation of the European property went beyond normal criminal representation duties. The proposed discovery on the alleged agreement did not take place [in the federal district court], nor did the proposed hearing on Mr. Bailey's breach claim take

> place during the forfeiture proceeding, which is designed instead to review prior ownership interests and the bona fide, innocent purchaser standards outlined in Section 853. *Plaintiff should be offered an opportunity to have the breach of contract allegations reviewed in court. . . .*
>
> * * *
>
> *The alleged agreement [between Respondent and the government] appears to have been more of a collaborative effort between the government and Mr. Bailey to rapidly accomplish what was necessary in the attempt to repatriate oversees property,* rather than a standard procurement of goods and services subject to the [Contract Disputes Act]. . . . *Mr. Bailey appears to have been afforded considerable and intentional maneuvering room by the government,* unencumbered by normal [Federal Acquisition Regulation] clauses, constraints and policies, *in order to facilitate a unique and even delicate effort, and to utilize Mr. Bailey's unique knowledge and relationship.*

(AD at 22, 37).

Having decided that Respondent's contract claims were not within the scope of the federal district court rulings and the subsequent appeal to the United States Court of Appeals for the Eleventh Circuit (AD14), Judge Horn set the stage for trial in that case to proceed "in the October/November 2000 time frame. . . . " (AF). In adjudicating whether an express or implied contract was agreed upon and breached, the court will necessarily determine as well whether Respondent held the stock in trust as alleged by the United States government, the premise on which most of the instant complaint is based.

Thus, Respondent respectfully requests that this disciplinary proceeding be abated or stayed pending determination of the court of claims action. *That* is the action in which the pivotal issue of a trust *vel non* will be determined involving the parties between whom it is *directly* at issue. Granting a stay is consistent with the interests of judicial economy and, most importantly, substantial justice. Denying abatement creates the prospect that discipline may be imposed on a premise which may later be disproven in the Court of Federal Claims action. As Respondent argued below, three years elapsed between initiation of this action and the filing of the Complaint (AA at 4-5). Having waited this long, Respondent submits that fundamental fairness requires that this proceeding await the resolution of the Court of Federal Claims case, which is only months away.

In THE FLORIDA BAR v. LUSSKIN, 661 So.2d 1211 (Fla. 1995), this Court distinguished its prior opinion in THE FLORIDA BAR v. WINN, 593 So.2d 1047 (Fla. 1992), and held that a referee in a disciplinary action has discretion to abate the action for good cause. In LUSSKIN, abatement was granted pending the appeal of the attorney's conviction for first-degree murder. This Court pointed out that if the felony conviction was affirmed, it would serve as conclusive proof of the criminal offense, while if it was reversed, "any time spent on disbarment proceedings would have been wasted." *Id.* at 1213, Similarly here, now that the Court of Federal Claims trial is mere months away, a resolution of that case in Respondent's favor will essentially moot the Bar's charges that Respondent mishandled property belonging to others. In its response (AG at 6-7), the Bar pointed out that the

court of claims judgment will create no collateral estoppel because of the non-mutuality of parties. *See* E.C. v. KATZ, 731 So.2d 1268, 1269 (Fla. 1999). Although lacking the preclusive effect of collateral estoppel, the admission of that judgment is available by judicial notice, and its relevance would be indisputable. Indeed, how could the Bar prevail on most of its claims if the Court of Federal Claims has determined that no trust existed? Only by granting a stay to await that outcome can this Court insure against a miscarriage of justice which inconsistent results would create. *See also* COHN v. CITY OF STUART, 702 So.2d 255 (Fla. 4th DCA 1997) (stay granted pending outcome of appeal in federal system).

It bears repeating that Respondent filed his case in the federal court on October 22, 1996 (AD at 8), while the Bar's complaint was not filed until October 1999 (AC at 21). A plethora of Florida cases have held it to be an abuse of discretion to refuse to stay a subsequently-filed state court action in favor of a previously-filed federal action which involves the same parties and the same or substantially similar issues. *See* FLORIDA CRUSHED STONE CO. v. TRAVELER'S INDEMNITY CO., 632 So.2d 217, 220 (Fla. 5th DCA 1994) (citing cases). *See also, e.g.*, CITY OF MIAMI BEACH v. MIAMI BEACH FRATERNAL ORDER OF POLICE, 619 So.2d 447 (Fla. 3d DCA 1993); NATIONAL AMERICAN INS. CO, v. CHARLOTTE COUNTY, 611 So.2d 1284, 1285 (Fla. 2d DCA 1992); SCHWARTZ v. DeLOACH, 453 So.2d 454, 455 (Fla. 2d DCA 1984), *citing* WADE v. CLOWER, 94 Fla. 817, 114 So. 548, 551 (1927).

A primary argument against a stay in such cases is delay due to congestion of the federal court docket CITY

OF MIAMI BEACH at 448. However, here the federal case has been pending for almost four years and is virtually on the eve of trial. Although the causes of action in the disciplinary proceeding and the court of claims case are not the same, that is not dispositive so long as issues involved in both actions are essentially the same. CHARLOTTE COUNTY, *supra;* STATE v. HARBOUR ISLAND, INC., 601 So.2d 1334, 1335 (Fla. 2d DCA 1992). Here, the trust/contract issue permeates both proceedings. Regarding the identity of parties, here the non-identity favors the granting of a stay because only the Court of Federal Claims case involves the very parties who occupy both sides of the underlying dispute, unlike the disciplinary proceeding, and consequently it is the most logical forum for resolution of that dispute.

In sum, Respondent respectfully maintains that judicial economy and fundamental fairness require that the disciplinary proceeding be abated or stayed pending the outcome of the trial in the Court of Federal Claims. To do otherwise could visit a miscarriage of justice upon one of the Bar's most respected and renowned attorneys, unnecessarily doing irreparable harm to his reputation and to his ability to pursue his profession. If the Court grants abatement of the proceeding pending the disposition of the Court of Claims case, the issues raised hereafter need not be met.

## II.

In addition, or in the alternative, Respondent respectfully requests a stay of the instant proceeding to permit

him access to highly relevant evidence which is unavailable to him presently.

**Testimony of Robert Shapiro**

As the accompanying affidavit of F. Lee Bahey (AH) recites, on February 2, 1996 in the United States District Court for the Northern District Court of Florida, Robert L. Shapiro, former co-counsel of Respondent, testified that Respondent had described the arrangement involving the shares of Biochem Pharma stock as a "trust." Respondent's counsel in that proceeding had no reasonable opportunity to cross-examine or impeach Shapiro because Shapiro was a surprise witness, and Respondent's counsel had been in the case for only one day at the time of his testimony. In the instant case, the Referee has denied Respondent's Motion in Limine seeking to exclude Shapiro's testimony (AA at 3), and has ruled that if Respondent wishes to elaborate on Shapiro's testimony, it is his responsibility to depose Shapiro.

Respondent's affidavit recites that he filed an application with the Referee on April 7, 2000 for a commission, valid under California procedure, to compel the deposition of Shapiro. The inter-office memorandum attached to and incorporated in the affidavit recites the steps taken to effect the deposition between April 7 and May 22, 2000, Also attached is the affidavit of Matthew Schwartz, an attorney in good standing with the State Bar of California, recounting his attempts to arrange for the deposition of Shapiro in California. He recited (AH, attachment at ¶ 4-7) that he initiated a California action to issue a subpoena for Shapiro, that California law requires the

subpoena to be personally served not less than 10 days prior to the scheduled deposition, that the deposition was targeted for May 18, 2000, but after four attempts at personal service, his process servers indicated "that they could not personally serve Mr. Shapiro at his offices because of security issues at his law firm. Nobody in his office would advise my process servers as to Mr. Shapiro's actual whereabouts." By the time Schwartz was able to determine the location of Shapiro's personal residence, the 10-day time limit for a deposition on May 18 had expired.

Thereafter, six attempts at personal service by two separate process servers attempting service in time for a deposition on May 26, 2000 failed. "Mr. Shapiro's (apparent) housekeeper indicated to one of my process servers that he was out of town and that he would not be returning home until the week of May 22, 2000." Schwartz recited that the next earliest date for Shapiro's deposition, assuming service is obtained, is June 1, 2000. Moreover, the interoffice memorandum by Respondent's secretary recites that in late May, Schwartz advised her that the California court required certified copies of the order appointing a commissioner, but that such copies could not be obtained because the Referee, Judge Ellis, was on vacation until May 15 "and could not take care of it before then."

Obviously, despite diligent effort, it has proven impossible to depose Shapiro within the presently-scheduled trial date. As Respondent's affidavit recites, the Bar "made no effort to utilize well-known interstate compact proceedings to compel the testimony of said Shapiro." Consequently, proceeding with the trial as presently

scheduled will deny Respondent his due process right to confront "at least by, videotape deposition – which has been arranged – his accuser" (AH at 2). Shapiro's credibility is critical to the resolution of the issues confronting Respondent, and Respondent is requesting a stay of at least 30 days to permit him to serve and depose Shapiro.

**Memorandum to Mary Lee Warren**

As Respondent's affidavit recites more fully, after the transfer of the Biochem Pharma stock, while Respondent was in Europe on May 19, 1994 attempting to repatriate Duboc's holdings there pursuant to the arrangement with the government, the United States attorney for the Northern District of Florida, P. Michael Patterson and his Criminal Division Chief, Gregory Miller, visited and delivered a memorandum to Deputy Associate Attorney General Mary Lee Warren in Washington "for the purpose of bringing attention to their great success in accomplishing one of the largest criminal drug forfeitures in the United States history." The memorandum to Warren has been kept secret by the United States government ever since. At the hearing on Respondent's motion (AH at 24-27), the court questioned whether the memorandum could be exculpatory after having already been reviewed by Judge Horn and Judge Paul in camera. As Respondent stated, the Bar had subpoenaed Judge Paul to testify, but following a protective order he did not do so and his view of the memorandum is unknown. Counsel argued that the importance of the memorandum required that it at least be produced before Judge Ellis in camera to determine its

relevance. Judge Ellis stated that she is without jurisdiction to compel its production from the federal government (AE at 35), but no such production would be sought. Respondent simply seeks the opportunity to complete his efforts to effect disclosure by Judge Horn in the Court of Federal Claims (AH at 5), and if she denies that request, then to *promptly* file suit to compel disclosure by the United States attorney for the Northern District of Florida. Consequently, Respondent requests a stay for any reasonable time which this Court might set to permit him to obtain the ruling from Judge Horn, or to promptly file suit to compel disclosure.

## Conclusion

Based on the foregoing arguments, Respondent respectfully requests that this Court abate the Bar disciplinary proceeding pending the outcome of the trial in the Court of Federal Claims. In addition, or in the alternative, Respondent respectfully requests a stay of the Bar disciplinary proceeding for a minimum of 30 days to permit him to complete the process necessary to depose Robert Shapiro, and/or a stay for a reasonable time within which to seek disclosure of the Warren memorandum by Judge Horn or to *promptly* file suit against the United States attorney for the Northern District of Florida to compel disclosure by that office.

## Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile and Federal Express to:

David Ristoff and Debra Joyce Davis, Branch Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, FL 33607; and Terrance Edward Schmidt, 1301 Riverplace Boulevard, Suite 1818, Jacksonville, FL 32207-9022, this 24th day of May, 2000.

DON BEVERLY, ESQ.
WARD, DAMON, BEVERLY,
TITTLE & POSNER, P.A.
4420 Beacon Circle, Ste. 100
West Palm Beach, FL 33407
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Respondent

By: _____
DON BEVERLY
Florida Bar No. 005916

By: _____
RUSSELL S. BOHN
Florida Bar No. 269824

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

F. LEE BAILEY,

Respondent.
_____/

CASE NO. SC96,767

TFB NO. 1996-51,085 (15B)
1997-50,110 (15B)

**SUPPLEMENT TO**
**EMERGENCY MOTION FOR ABATEMENT OR STAY**

Respondent, F. LEE BAILEY, by his undersigned counsel, hereby provides this Supplement to the Emergency Motion for Abatement or Stay filed yesterday, May 24, 2000, as follows:

Attached to this supplement is a memorandum received by undersigned counsel today reciting the most recent actions taken to effect service on Robert Shapiro, which may prove to be sufficient service for a deposition to be held 10 days thereafter. This information will be provided to this Court in the form of an affidavit by the process server as soon as undersigned counsel can do so.

Just as it is questionable how the Florida Bar could prove its allegations by the required standard of clear and convincing evidence if and after the Court of Federal Claims has found that no trust existed, *see* THE FLORIDA BAR v. QUICK, 279 So.2d 4, 8-9 (Fla. 1973), so also the Bar should not be permitted to claim to have met the clear and convincing standard by the testimony of a witness in a prior proceeding wherein Respondent had no fair

opportunity for cross-examination, *See* IN RE DAVEY, 645 So.2d 398, 404 (Fla. 1994).

THEREFORE, Respondent again requests that this Court grant abatement or stay.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile and mail to: David Ristoff and Debra Joyce Davis, Branch Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, FL 33607; and by mail to Terrance Edward Schmidt, 1301 Riverplace Boulevard, Suite 1818, Jacksonville, FL 32207-9022, this 25th day of May, 2000.

DON BEVERLY, ESQ.
WARD, DAMON, BEVERLY,
TITTLE & POSNER, P.A.
4420 Beacon Circle, Ste. 100
West Palm Beach, FL 33407
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
Suite 3A/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Respondent

By: /s/ Russell S. Bohn
for DON BEVERLY
Florida Bar No.
005916

By: /s/ Russell S. Bohn
RUSSELL S. BOHN
Florida Bar No.
269824

**INTER-OFFICE MEMORANDUM**

TO: Russ Bohn

FROM: Pat McKenna

DATE: 5/25/00

RE: Service of Robert Shapiro

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On May 24, 2000 at approximately 3:30 p.m. eastern time I had one of my investigators telephone Robert Shapiro at his home.

He left a voice mail on Shapiro's home machine. [(310) 550-7755] Within minutes Shapiro returned the phone call to my investigator from his home (my investigator had caller i.d. and it was the same number)

Approximately 15-20 minutes later the process server, Kevin Rottner, spoke on the telephone to the same home phone number to a voice he recognized as Robert Shapiro's. After a brief conversation Rottner told Shapiro he had a subpoena for him and Shapiro said "I am not Robert Shapiro". Rottner then informed the voice that if he could show i.d. that he was not Robert Shapiro he would not leave the papers at his home. When he arrived at Shapiro's home a black man appeared at the door and said he was the man that had been speaking with Rottner a few minutes earlier.

Rottner informed him "you are not the same person I was speaking to; I know I was speaking to Robert Shapiro" and he left the subpoena at Shapiro's door. Rottner also informed the man that he was proceeding to Shapiro's law office with a copy of the subpoena.

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**Supreme Court of Florida**

FRIDAY, MAY 26, 2000

**CASE NO.:** SC96767
Lower Tribunal Nos.:
1997-50,110(15),
1996-51,085(15B)

THE FLORIDA BAR vs. F LEE BAILEY

Complainant(s) Respondent(s)

Respondent's Emergency Motion for Abatement of Stay and Emergency Motion for Temporary Stay are hereby denied.

HARDING, C.J., and WELLS, ANSTEAD, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

kb
Served:

DAVID ROBERT RISTOFF
DON BEVERLY
F. LEE BAILEY ✓
RUSSELL S. BOHN
HON. CYNTHIA ELLIS, JUDGE
BILLY JACK HENDRIX
MICHAEL P. WALSH

26 April 1994

Mr. Pierre Michel
Union Banque Shisse
36-38 Grand Rue
Luxembourg

Ref: 51212FB

Cher M. Michel:

Voulez-vous fermex le compte au dessus et envoyer les dollars U.S. *uniqument* au compte suivant:

Bay Bank
590 Harrison Avenue
Panama City, Florida 32402
USA

A/C #250 899 1301
ABA # 063205208
Account Holder: MOON

Pour les actions "Bio Chem" envoyer au compte suivant:

Credit Suisse
Succursale Geneve – Grand Casino
19 Quai de Mont-Blanc
1201 Geneve, Suisse
Attention: Jean Francois Tanner

Compte: #0267-152427-52

Merci pour le service.
/s/ Claude DuBoc
Claude DuBoc

P.S. Je-vous Appellerai demain

DEPOSITION EXHIBIT 1
4/13/00 KIRWIN

April 28, 1994

AMS Management Services Limited
7/F Wang Ree Building
34-37 Connaught Road Central
Hong Kong

Ref: SHAW CHUEN LIMITED

Dear Sirs:

Please be advised that pursuant to the Nominee Shareholding Agreements of 1st June, 1990, you are to take immediate steps to transfer registration of holder of title to the Shares of Shaw Chuen Limited from the Nominees, Jinlap Limited and Boxjet Limited, or any successors thereto, to my attorney, Mr. F. Lee Bailey, as my Trustee. You are further requested to prepare the appropriate Trust * Deeds or other documents necessary to accomplish this transfer. Please send all documents directly to Mr. Bailey at Suite 909, 1400 Centrepark Blvd., West Palm Beach, Florida 33401 7490, USA, Telephone (407) 687-3700, Facsimile (407) 687-3708.

Thanks so much for your attention and consideration. I will call you later.

Best Personal Regards,

Claude Duboc

April 28, 1994

AMS Management Services Limited
7/F Wang Kee Building
34-37 Connaught Road Central
Hong Kong

Ref: SAI YUK INDUSTRIAL LIMITED

Dear Sirs:

Please be advised that pursuant to our Nominee Shareholding Agreement of 25th January, 1991, you are to take immediate steps to transfer registration of holder of title to the Shares of Sai Yuk Industrial Limited from the Nominees, Ryecroft Associates Limited and Interagro Limited, or any successors thereto, to my attorney, Mr. F. Lee Bailey, as my Trustee. You are further requested to prepare the appropriate Trust Deeds or other documents necessary to accomplish this transfer. Please send all documents directly to Mr. Bailey at Suite 909, 1400 Centrepark Blvd., West Palm Beach, Florida 33401-7490, USA, Telephone (407) 687-3700, Facsimile (407) 687-3708.

Thanks so much for your attention and consideration. I will call you later.

Best Personal Regards,

Claude Duboc

**TIMOTHY P. CHINARIS**
7552 Trails End
Jacksonville, Florida 32277
(904) 680-7601 (O) (904) 745-5148 (H)
email: tchinari@fcsl.edu

*EDUCATION*

M.S. in Library and Information Studies
Florida State University, 1996

J.D. with Honors
University of Texas at Austin, 1984

B.S. Cum Laude in Business Administration
Florida State University, 1977

*EMPLOYMENT*

**Associate Dean, Information Resources and Technology and Associate Professor of Law,**
**Florida Coastal School of Law** Jacksonville, Florida
August 1998-Present

Director of all law school computing, instructional technology, and telecommunications operations, including planning, purchasing, and training. Responsible for all facets of library operation, including personnel, budgeting, acquisitions, cataloging, reference services, circulation, and training. Circulation, acquisitions, cataloging, and budget functions are automated through an Innovative Interfaces system. Develop and administer annual budget of more than $1,600,000 and staff of 25. Teach classes in legal research, including computerized research using Westlaw, Lexis, and the Internet. Faculty responsibilities include teaching courses in legal ethics and professional responsibility, and chairing and serving on various committees.

**Director of Library and Technology Center and Assistant Professor of Law,**
**Florida Coastal School of Law** Jacksonville, Florida April 1997-July 1998

First director of new law school library, which contains more than 200,000 volume equivalents and occupies 40,000 square feet.

**Ethics Director, The Florida Bar** Tallahassee, Florida 1989-1997

Director of 12-person staff that provided information and advisory opinions to Florida lawyers on legal ethics issues. The Florida Bar is a nationally recognized leader in providing assistance to bar members in the form of ethics information and advice, with the goal of helping members avoid disciplinary problems. Duties included: overseeing operation of the advisory opinion process; hiring, training, and supervising staff attorneys; developing and administering an annual budget of $750,000; speaking to local, state, and national groups on professional responsibility issues; counseling the Florida Bar's Professional Ethics Committee, Standing Committee on Advertising, and Board of Governors; publishing the *Ethics Update* quarterly newsletter; writing and editing for various legal publications; and serving on the Florida Bar's Internet Advisory Committee.

**Assistant Ethics Counsel, The Florida Bar** Tallahassee, Florida 1986-1989

**Godwin & Carlton, P.C.** Dallas, Texas 1986
Associate in commercial litigation section of large civil practice law firm.

**Texas Court of Appeals** Dallas, Texas 1985
Research Attorney for Justices Annette Stewart and Ted M. Akin, Fifth Judicial District Court of Appeals. The 13-justice court was the largest appellate court in Texas.

**Texas Court of Appeals** Dallas, Texas 1984
Briefing Attorney for Justice Ted M. Akin, Fifth Judicial District Court of Appeals.

**Unisys Corporation** Tallahassee, Florida and Dallas, Texas 1978-81
Branch Financial Manager for worldwide computer equipment and software company.

*PROFESSIONAL ACTIVITIES*

Admitted to Practice Law in Florida (1986) and Texas (1984)

Professional Ethics Committee of The Florida Bar

Professionalism Committee of The Florida Bar

Association of Professional Responsibility Lawyers (Past Chair, Ethics Opinion Committee)

Board of Trustees, City of Jacksonville Public Library (Chair, Budget Committee)

Board of Directors, NEFLIN (Northeast Florida Library Information Network)

Volunteer Reference Librarian, Leroy Collins Leon County Public Library (1993-1997)

Volunteer Reference Librarian, Florida State University Law School Library (1996)

AALL (American Association of Law Libraries)

ACL (Association of Christian Librarians)

FLA (Florida Library Association) (Member, Intellectual Freedom Committee)

SLA (Special Libraries Association)

Member, various historical societies and organizations

*SPEAKING ENGAGEMENTS*

Presented "Electronic Ethics Issues" at the American Bar Association General Practice, Section Spring Meeting in May 2000.

Spoke on "Practical Legal Research and Analysis" at a Jacksonville seminar for paralegals in November 1999.

Presented "Lawyers Online: Do Ethics and Image Mix?" at the Williams Inns of Court in Orlando in October 1999.

Spoke on "Ethical Issues in the Taking and Use of Depositions" at a continuing legal education seminar in Jacksonville sponsored by Lorman Education Services in July 1999.

Featured luncheon speaker on the topic of "Professionalism in the Information Age" at the annual Amelia Island resort seminar sponsored by Jacksonville Bar Association in June 1999.

Presented "Recent Ethical Developments" at the "Hot Topics in Commercial Litigation" seminar sponsored by the Florida Bar Business Law Section in April 1999.

Spoke on "Ethics in the Attorney-Client Relationship" and "Substance Abuse in the Practice of Law" at The Florida Bar's "Practicing With Professionalism" program in November 1998.

Presented "Why Don't More People Like Us, and What Should We Do About It? Another View of Professional Ethics and Professionalism," at the Jacksonville Inns of Court in September 1998.

Taught "Legal Research on the Internet," a CLE course sponsored by the Jacksonville Bar Association, at various times during 1998 and 1999.

Spoke on "Ethics for Business Litigators" at the 1998 Florida Bar Business Litigation Certification Examination Review Course in Orlando, Florida.

Participated in a panel discussion on "Ethical Considerations in Bankruptcy Practice" at the December 1997 meeting of the Tampa Bay Bankruptcy Bar Association.

Spoke on "The Ethics of Ethics Consultation" at the 1997 ABA National Conference on Professional Responsibility, held in Naples, Florida.

At the invitation of the Supreme Court of Kentucky, addressed the 1996 Kentucky Bar Association Annual Convention on "Lawyer Advertising Law and Regulation."

Discussed professional responsibility rules and law for business litigators at the 1997 and 1996 Florida Bar Business Litigation Certification Examination Review courses in Orlando, Florida.

Participated in a panel discussion on "The Ethics and Expenses of Undue Influence" at the 1996 Attorney Trust Officer Liaison Conference in Palm Beach, Florida.

Addressed the 1994 ABA National Conference on Professional Responsibility on the practical aspects of "Operating a State Bar Ethics Opinion and Information Service."

Spoke to the 1993 Florida Conference of County Court Judges on "What You Can Do About Attorneys' Professional Conduct."

Addressed the 1992 Annual Meeting of the Association of Professional Responsibility Lawyers on the subject of "New and Controversial Advisory Opinions."

Presented "10 Common Sense Rules to Guide You Through the Ethical Minefields of the 1990's" during a 1991 ethics seminar sponsored by Stetson University College of Law.

Spoke on "Nonlawyer Involvement in the Practice of Law" at the 1989 ABA National Conference on Professional Responsibility in Chicago.

Presented in-house ethics and professional responsibility seminars to various Florida law firms and corporate legal departments.

Spoke on professional ethics issues at conferences and seminars sponsored by various bar organizations: American Bar Association General Practice Section; Brevard County Inns of Court; Business Law Section of The Florida Bar; Family Law Section of The Florida Bar; General Practice Section of The Florida Bar; Government Lawyers Section of The Florida Bar; Labor and Employment Law Section of The Florida Bar; Manatee County Bar Association; and Real Property, Probate and Trust Law Section of The Florida Bar.

***PUBLICATIONS***

*Florida Ethics Guide for Legal Assistants and Attorneys Who Utilize Legal Assistants* (3d ed., Fla. Bar Continuing Legal Education, 1998).

"Florida Professional Responsibility in 1999: The Rules of the Game," 24 *Nova Law Review* 199 (Fall 1999), co-authored with Elizabeth Clark Tarbert.

"The New Advertising Rules in a Nutshell," *The Florida Bar News,* January 15, 2000, p. 4.

"Professional Responsibility: 1998 Survey of Florida Law," 23 *Nova Law Review* 161 (Fall 1998), co-authored with Elizabeth Clark Tarbert.

"The Ethics of Ethics Consultation: The Consulted Lawyer's Perspective," *The Professional Lawyer,* 1997 Symposium Issue.

"Florida Professional Responsibility Law in 1997," 22 *Nova Law Review* 215 (Fall 1997), co-authored with Elizabeth Clark Tarbert.

"Professional Responsibility: 1996 Survey of Florida Law," 21 *Nova Law Review* 231 (Fall 1996).

"Professional Responsibility in Florida: The Year in Review, 1995," 20 *Nova Law Review* 223 (Fall 1995).

"Answers to Frequently-Asked Ethics Questions," 65 *Florida Bar Journal* 49 (January 1991).

Author of numerous "Ethically Speaking" columns published in the *Florida Bar News,* 1987-1996.

Co-author, "Ethics for the Florida Family Law Attorney" columns published in the *Family Law Commentator* newsletter of the Florida Bar Family Law Section.

Editor, Annual Supplements to *Professional Ethics of The Florida Bar,* 2d ed. (1987), 1989-97.

Creator and Editor, *Ethics Update* quarterly newsletter.

Editor, *Handbook on Lawyer Advertising and Solicitation,* 2d ed. (1994), 3d ed. (1995), 4th ed. (1997).

Contributing Author, *Florida Legal Ethics* (1992), and periodic supplements.

**IN THE SUPREME COURT OF FLORIDA**
**(Before a Referee)**

**THE FLORIDA BAR,**
**Complainant,**

**v.**

**F. LEE BAILEY,**
**Respondent**

**CASE NO. SC96767**
**TFB No. 1996-51,085 (15B)**
**1997-50,110 (15B)**

RESPONDENT'S RESPONSE TO
COMPLAINANT'S EXPERT INTERROGATORIES

COMES NOW Respondent, F. Lee Bailey, and files the following answers to Complainant's Expert Interrogatories with respect to Respondent's expert witness Timothy P. Chinaris:

**1. Please identify which witness, if any, on Respondent's Witness List you intend to call as an expert witness.**

Timothy P. Chinaris.

**2. With respect to each person identified in Interrogatory 1, state (i) the witness' qualifications as an expert; (ii) the specific subject matter upon which the witness is expected to testify; (iii) the substance of the facts and all opinions to which the witness is expected to testify; (iv) a summary of the grounds for each opinion; and (v) the compensation or method of calculating compensation, if any, to be paid to the expert in connection with this testimony in this proceeding.**

(i) The witness's qualifications as an expert are set forth on the accompanying curriculum vitae ("Exhibit A").

(ii) The witness is expected to testify concerning the ethical propriety of the respondent's conduct as described in the Complaint.

(iii) The substance of the facts and opinions to which the witness is expected to testify are follows:

(A) Mr. Bailey's actions in connection with the transfer of the Japanese stock proceeds to the government were, at most, a technical violation of the trust accounting rules. The funds were deposited into a non-trust account due to a simple error. All funds were completely accounted for and promptly delivered to the government as agreed. No one was harmed.

(B) Mr. Bailey did not act unethically in his handling of the Biochem Pharma stock.

(1) Ownership of these shares was transferred to Mr. Bailey by his client, and thus he had no ethical obligation to maintain any sale or loan proceeds from these shares in a trust account. To the contrary, maintaining such funds in a trust account would have been improper commingling. There was no misappropriation because the stock was Mr. Bailey's property.

(2) Mr. Bailey's acceptance of the Biochem Pharma stock from his client was not a violation of the conflict of interest rule. The negotiations regarding divestiture of assets and the plea to be entered were conducted by Mr. Bailey for his client's benefit, and transfer of the stock was part of the arrangement. The client consented to the stock

transfer in writing. No one disputes that the agreement reached was a favorable one for Mr. Bailey's client.

(C) Mr. Bailey did not violate the Rules of Professional Conduct by continuing to expend funds relating to the Biochem Pharma stock following entry of the court's "freeze" order. Because he was not served with the order and had not seen it, Mr. Bailey did not "knowingly disobey an obligation under the rules of a tribunal" as prohibited by Rule 4-3.4.

(D) Mr. Bailey did not violate the Rules of Professional Conduct in his testimony relating to the court's January 12, 1996, and January 25, 1996, orders. The violations alleged by the Bar require knowledge or intent on the part of the lawyer. Mr. Bailey believed that his testimony was truthful when given.

(E) The January 4, 1996, letter from Mr. Bailey to Judge Paul did not violate the Rules of Professional Conduct.

(1) There is no evidence that Mr. Bailey intended to improperly "influence" the judge, as prohibited by Rule 4-3.5.

(2) The letter was written in conformity with Mr. Bailey's ethical obligations; he was reporting the misconduct of another lawyer to the judge pursuant to Rule 4-8.3, and was attempting to prevent or rectify the commission of a fraud on the court as required by Rule 4-3.3.

(3) There was no violation of the confidentiality rules. Even assuming that the information in question was protected from the government and the judge by Rule 4-1.6, Mr.

Bailey's obligation of candor to the tribunal under Rule 4-3.3 is a mandatory exception to the confidentiality rule. Furthermore, Mr. Bailey was using the information in question for his client's benefit, not to his client's disadvantage.

(F) The January 21, 1996, letter from Mr. Bailey to Judge Paul did not violate the Rules of Professional Conduct.

(1) A copy of the letter was promptly delivered to the government.

(2) Even assuming that the information in question was confidential with respect to the government and the judge, Mr. Bailey is permitted by Rule 4-1.6 to disclose such information to the extent reasonably necessary to defend his conduct.

(G) It would be unethical as a conflict of interest for the government attorneys to ask Mr. Bailey to enter into a trust arrangement of the type that the government and the Bar have alleged existed.

(iv) The opinions of the expert witness are based upon the facts as presented to him (see list of materials reviewed, "Exhibit B"), the Florida Rules of Professional Conduct, relevant case law, and relevant ethics opinions.

(v) The expert witness is to be paid for time expended based on an hourly rate of $200 ($100 for travel time), plus reimbursement for reasonable expenses incurred.

STATE OF FLORIDA

COUNTY OF DUVAL

BEFORE ME, the undersigned authority, personally appeared TIMOTHY P. CHINARIS, who, after being duly sworn, states that the foregoing Responses to Complainant's Expert Interrogatories are true and correct to the best of his knowledge.

_____

TIMOTHY P. CHINARIS

Subscribed and sworn to before me
this ___ day of May, 2000, by
TIMOTHY P. CHINARIS
who ( ) is personally known to me or
who ( ) produced the following
identification:

_____

_____

NOTARY PUBLIC

IN THE
SUPREME COURT OF FLORIDA

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**CASE NO. SC96767**

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**THE FLORIDA BAR,**

Complainant,

vs.

**F. LEE BAILEY,**

Respondent.

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# RESPONDENT'S INITIAL BRIEF

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On Review of a Report of a Referee
in a Florida Bar Disciplinary Proceeding

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## STATEMENT OF THE CASE

This is an appeal from the July 24, 2000 Amended Report of Referee recommending that F. Lee Bailey "be disbarred from the practice of law in Florida," Amended Report, p. 20.[1]

The Referee, Circuit Court Judge Cynthia A. Ellis, recommended that F. Lee Bailey should be found guilty on six of the seven counts ("Allegations of Misconduct") alleged in the Florida Bar's Complaint. Her recommendation came at the conclusion of a multi-day hearing that centered upon Bailey's handling of various assets of Claude Duboc, a federal defendant for whom Bailey had negotiated a plea agreement in the Northern District of Florida in a case pending before United States District Judge Maurice Paul.

The Agreement included the forfeiture of millions of dollars of foreign assets and properties. However, one asset, 602,000 shares of Biochem Pharma, Inc. stock, was, with the acquiescence of the United States Attorney's Office for the Northern District of Florida, transferred by Duboc to Bailey. The crux of the Bar's allegations against Bailey is the Biochem stock transfer and Bailey's use of the stock.

The Bar's Complaint alleged that the Biochem shares were given to Bailey pursuant to "an oral agreement with the United States Attorney for the Northern District of Florida for the following specific: purposes: "(A) To use so much of the Biochem Pharma, Inc. stock as required

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[1] The Amended Report is attached as an Appendix A to this Brief.

for the maintenance of certain Duboc owned real and personal property located in Europe, pending the liquidation of such property. (B) To provide a res from which attorneys' fees could be paid after application and approval by Judge Paul. (C) To forfeit to the United States so much of the Biochem Pharma, Inc. stock or the proceeds of such stock as thereafter remained to inure to the benefit of Duboc and the United States of America." Complaint, ¶¶ 6 and 27. The Complaint alleged:

> This *oral trust agreement* was announced and ratified by Respondent [Bailey] during a meeting in chambers with Judge Paul on May 17, 1994.

Complaint, ¶¶ 7 and 28 (emphasis supplied)

The Bar's Complaint claimed that Bailey used some of the Biochem stock (which had risen in value) to generate funds for his personal use:

> The expenditures by Respondent of approximately $3.6 million for his law offices, other business interests and payment of personal expenses, funded by the sales and loan proceeds from the Biochem Pharma, Inc. stock, had no nexus to the specific purposes of the entrustment of such stock to Respondent and constitute misappropriations.

Complaint, ¶ 29.

As a result, the Bar alleged Bailey violated various Rules Regulating The Florida Bar (Rule 3-4.3; 4-8.4(b); 4-8.4(c); 5-1.1; 4-1.15(a)). Complaint ¶'s 30-32, Second Allegation of Misconduct.

On January 12, 1996, Judge Paul entered an Order that approved the substitution of new counsel for Duboc, but retained jurisdiction "over Bailey to obtain from him a full accounting of the monies and properties held in trust by him for the United States of America." The Order also required that "[a]ll monies . . . and other assets received by Bailey from or on behalf of Duboc, including the aforementioned shares of Biochem Pharma stock shall be frozen as of the date of this Order and no further disbursement of any of these funds shall be made unless authorized by this Court. Bar Exhibit 1; Appendix C. A second Order, dated January 25, 1996, required Bailey to appear before Judge Paul on February 1, 1996 and "bring with him all shares of stock of Biochem Pharma, Inc., held by him [and] . . . be prepared to make a full accounting as to all assets he received from Claude Duboc. . . . " Bar Exhibit 2; Appendix F.

The Bar alleged that Bailey's personal money market account contained sales and loan proceeds derived from Biochem stock and "[b]y continuing to expend funds from his money market account after service upon and knowledge by the Respondent of the January 12, 1996 . . . and January 25, 1996 order[s] of the Court," Bailey violated Rule 3-4.3, 4-3.4(c) and 4-8.4(d). Complaint, ¶ 43, Third Allegation of Misconduct.

The Fourth Allegation of Misconduct in the Bar's Complaint alleged that Bailey testified falsely that he had not seen the January 12 and 25 Orders until February 2, 1996, thus violating Rules 3-4.3, 4.8-4(b), 4-8.4(c) and Rule 4-3.3(a)(1). Complaint ¶¶ 44-48.

The Fifth Allegation of Misconduct alleged that "[b]y appropriating to his own uses and purposes proceeds derived from the Biochem Pharma, Inc. shares entrusted to him," Bailey's exercise of independent judgment was limited by his own interests; that he acquired a pecuniary interest adverse to his client; and used information to the disadvantage of his client. Rules 4-1.7(b), 4-1.8(a) and (b).

The Bar's sixth count was dismissed.

The Bar's Seventh Allegation of Misconduct involved an *ex parte* letter sent by Bailey to Judge Paul on January 4, 1996, another letter sent on January 21, 1996 and a May 10, 1996 affidavit filed in proceedings before Judge Paul, all of which related to the Duboc matter and the Biochem stock. The Bar alleged that those submissions were improper under Rules 4-3.5(a), 4-3.5(b), 4-1.6(a), 4-1.8(a), 4-1.8(b) and 4-1.7(b). Complaint, ¶¶ 55-66.

Another Duboc related allegation of misconduct was Bailey's deposit of $730,000 from the sale of certain Japanese stocks held by Duboc into Bailey's non-trust money market account, which was then disbursed from that account to the United States Marshall. The Complaint alleged that transaction violated Rule 4-1.15(a) because the monies were not held in trust Complaint, ¶¶ 23-26. First Allegation of Misconduct. As to Count I, the Referee found "by clear and convincing evidence that the Respondent . . . failed to set up a separate account . . . and . . . commingl[ed] . . . the $730,000 during the time the funds were held by him in his private account." Appendix A, p. 5, ¶ 8.

As to Count II, the Referee found "by clear and convincing evidence that Respondent misappropriated

sales and loan proceeds from the Biochem Pharma, Inc, stock and commingled the sales and loan proceeds with his own funds. . . . Appendix A, p. 9, ¶ 15.

As to Count III, the Referee found "by clear and convincing evidence" that the Respondent violated certain Rules "by engaging in conduct which is unlawful or contrary to honesty and justice . . . by engaging in criminal misconduct . . . by engaging in conduct constituting dishonesty, fraud, deceit or misrepresentation, and . . . by misusing money held in trust" and by "expending funds from the account after . . . knowledge of the January 12, 1996 order. . . . " Appendix A, p. 10, ¶¶ 11-12.

As to Count IV the Referee found "by clear and convincing evidence that the Respondent lied" when he repeatedly said "that he did not see the January 12 and January 25 orders prior to February 2. . . . " Appendix A, p. 13, ¶ 10.

As to Count V, the Referee found "by clear and convincing evidence" that the Respondent used information to the disadvantage of his client. Appendix A, p. 14, ¶¶ 10, 13.

As to Count VII, the Referee found "by clear and convincing evidence that there was an improper communication . . . " and that information detrimental to the client was revealed. Appendix A, p. 17, ¶¶ 14-15.

The Referee recommended disbarment. Bailey's Petition for Review seeks reversal of the findings, and rejection of the recommendation of disbarment.

## STATEMENT OF THE FACTS

### A. THE BIOCHEM PHARMA, INC. STOCK AND DUBOC

Claude Duboc was a Canadian drug dealer who was indicted in the Northern District of Florida and after his arrest was brought to Tallahassee in April, 1994. TR 239-240. He was represented by F. Lee Bailey and Robert Shapiro, a California lawyer, and before Duboc's first appearance they met with Assistant United States Attorneys Gregory Miller, Tom Kirwin and Roy Atchison, and DEA Agent Carl Lilley. TR 240-241. Some of the discussion was about forfeiture of Duboc's assets, and within the week, Duboc's lawyers indicated to the government their client's willingness to enter into a plea agreement, which would include Duboc forfeiting assets to the United States. TR 242-247. The Duboc assets included "tens of millions of dollars in properties" in France, which required substantial sums to be expended to maintain them in an effort to successfully liquidate them. TR 317. One property was an estate outside of Paris valued at six million dollars, and another near Cannes, valued at twenty-five million dollars. TR 129. The Cannes house had "20 employees on staff." TR 554. Two yachts at a Cannes marina were also worth millions. TR 560-561. Another asset was 602,000 shares of Biochem Pharma, Inc, stock, which was worth about "six and a half million dollars." TR 250-252.[2] Duboc believed the stock would go up in value, and did not want it sold in a block by the

---

[2] The actual value of the stock was $5,891,352. Appendix D, p. 5.

government because sale of such a large block would depress the stock. TR 252-253.

There was a suggestion that an asset should be set aside to pay for the expenses and management of the to-be-liquidated properties. AUSA Miller said he was "not sure if I put this on the table first or he [Bailey] brought it up first – but allowing Judge Paul to make a decision as to what a reasonable fee would be in the case; and if the United States, rather than seizing and forfeiting those funds, allowing the Judge to use that pool he set aside to manage the property, and to also be used by the court to authorize or pay Mr. Bailey's attorney's fees based on the court's determination of reasonableness." TR 250, Miller continued: "[H]e was authorized to sell only those portions of the stocks that were needed to pay, on a reasonable basis, whatever expenses were being incurred in the management of these properties overseas, which were accruing very large monthly costs for upkeep of these properties. TR 251-252. Miller said: "He [Bailey] agreed to those terms." TR 254.

There was nothing in writing setting forth or confirming Miller's "terms." On May 17, 1994, before Duboc was to enter a guilty plea, Miller, who "was the one representing the government and making statements on behalf of the United States" (TR 256), concluded that a pre-plea meeting with Judge Paul was "imperative" because "Judge Paul was very strict" and that he should "be made aware of the arrangement, because if the judge were not inclined to go along with this and to allow the funds to be used in this manner, it would have caused a serious problem had we attempted to enter this plea agreement. . . . " TR 256-257.

There was no court reporter at the "pre-plea" meeting. There is no transcript of what occurred. Present were AUSA's Miller, Kirwin and Atchison, the United States Attorney Michael Patterson, DEA Agent Carl Lilley, Bailey, and Miami lawyer Edward Shohat, who became, for a time, co-counsel for Duboc. AUSA Miller was the lead attorney (TR 255-256) and he related that he "had been tipped off by Mr. Bailey that his co-counsel Mr. Shohat was going to ask to have some stock given to him . . . and that he recommended that we oppose that. . . . " TR 258. Mr. Shohat made that request and AUSA Miller related to the Referee what he said he told Judge Paul:

> [I] interjected myself and said that we were opposed to that.
>
> I had mentioned to the court at that specific time that approximately six and a half million dollars in stock had been given to the defense *in trust* by their client to hold and to be used for two purposes.
>
> The stocks are to be held *in trust* to be sold only as needed, and it was explained to the court these stocks were expected to be very valuable, appreciate in value, and the defense would be selling only those portions of the stock as needed to manage and keep up these properties, that no fees were going to be taken out of those stocks by the defense for the purpose of attorney fees or costs, and that the defense had agreed to only apply for their fees and costs associated with representation at the conclusion of the case, and that they were going to be agreeable to letting the court determine on a reasonable basis whether or not they were going

> to be entitled to those fees that were being claimed.
>
> Both Mr. Shohat and Mr. Bailey agreed to that with the court, acknowledged their acceptance of the understanding of what I had represented, and that was pretty much the substance of what was discussed in chambers,
>
> The Judge indicated that he was agreeable to that disposition and the use of the funds as proposed, and we then made arrangements for the court to accept Claude Duboc's Plea.

TR 259-260 (emphasis supplied).

AUSA Tom Kirwin, who made notes, said "I know I had a note there about Mr. Shohat and the Japanese stock. I know I had a note about Mr. Bailey, and Mr. Shohat assured the court that they had not taken any fees from the Duboc case yet. I believe I had a note in there concerning the agreement to let them use the funds to market and maintain the houses and pay expenses." TR 149-150. Subsequent to the Bar hearing, Kirwin was deposed in the Court of Claims case brought by Bailey against the United States to secure the return to him of the Biochem assets that Judge Paul ultimately took from Bailey.[3] Kirwin had been unable to find one note at the Bar hearing, but at the Court of Claims deposition the retrieved note prompted this colloquy:

---

[3] That case, styled *F. Lee Bailey v. United States*, in the United States Court of Federal Claims, No. 96-666C (Judge Horn) is awaiting trial. This Court granted Bailey's Motion to Supplement the Bar Record with the Kirwin and other depositions in that case.

BY MR. HOROWITZ [BAILEY'S COUNSEL]

Q. Okay. Would the – that note, one of the notes on that page concern the hearing in front of Judge Paul.

A. [MR. KIRWIN] Uh-hum.

Q. Is that correct?

A. Uh-hum. It is.

* * *

Q. Okay. So we'll – we'll refer to that as the best record of – of that proceeding.

But – so now in relation to the in-chambers discussion that your notes make reference to –

A. Uh-hum.

Q. – was there a statement by anyone at that meeting that the Biochem Pharma stock was received by Bailey in trust?

A. *I don't remember that the words "in trust" were ever used.*

Kirwin Deposition, Supplemental Record, pp. 266-268 (emphasis supplied). Then United States Attorney Michael Patterson, who was at the May 17, 1994 hearing as "an observer," said that Judge Paul was advised that "some of the property would be available at the end of the case potentially for fees, but that no amount of money was going to be taken by counsel from Duboc's assets without court approval," TR 485. Patterson's testimony made no mention of a "trust." TR 482-493.

Ed Shohat, co-counsel for Duboc, told the Referee "This trust agreement was spelled out for the Judge." TR 520. Shohat described the off-the-record meeting as brief:

> We went into the Judge's chambers and initially, Mr. Duboc was brought into the chambers; but the Judge, as I recall practically immediately directed the Marshal to take Mr. Duboc out of the chambers, and the rest of us were in the chambers for probably no more than five or ten minutes at the very most.

TR 519. Shohat said Judge Paul was told that Mr. Bailey was going to assist the court by selling assets and that "the stock which was being separated out would be returned at the end of the day and from that asset the Judge would be – a motion would be filed for a reasonable attorney's fee for Mr. Bailey and myself, and possibly Mr. Shapiro. . . . " TR 520.

The risk was all Bailey's:

[MR. BEVERLY, Bailey's Counsel]

Q. My question is this, Mr. Miller: How did you explain the risk to Mr. Bailey?

A. [AUSA MILLER] I said that that was the only account that we were making available to him, that stock fund; that if it went down, he was risking that he was not going to be able to pull out the monies that he needed to manage those properties; and possibly not have the money in that fund to pay his fees.

* * *

Q. Did you ever tell Mr. Bailey that had the stock gone down, had there been insufficient funds with which to pay his fee, that that was a gamble which he was taking and that if he ran out of money that he simply would have to do without a fee?

* * *

A. Essentially yes. Essentially, that's basically what I told Mr. Bailey. . . .

TR 351-352.

The government arranged the transfer of Biochem Pharma, Inc. stock to Bailey. AUSA Roy Atchison, who had been doing forfeiture work for "17 plus years," was asked "how many deals like that have you entered into when you had absolutely no written memorandum of any kind?" He answered "This is the only one involving shares of stock that I recall." TR 451. Atchison prepared the only written document – the letter signed by Duboc transferring the 602,000 shares of Biochem Pharma, Inc, to Bailey's numbered account at Credit Suisse, Geneva, Switzerland:

A. [ATCHISON] Well, I had the letter typed. Claude wrote it, I had it typed, he signed it, and I helped him send it.

* * *

Q. So there was no secret as to A, where the money was going –

A. That's correct.

Q. – And B, what the identity of the account was.

A. That's correct,

TR 437.

Duboc wrote the letter "by hand on a yellow pad for me and I [Atchison] had it typed." TR 409. A copy of the letter is attached as Appendix G. It says simply "as to the

shares of Bio Chem send them to the following account," and identifies Bailey's account number.

Q. Mr. Atchison does the word "Trust" or "Trustee" appear in that document at all?

A. No, it does not. That was not in any of the letters.

TR 409.

Bailey did not understand there to be a "trust" agreement.

Bailey knew that he was accountable for the use of the stock to manage and liquidate Duboc's properties, but since he took the risk of loss of value, he believed he was not restrained from benefitting as to any gain in the stock price.

Q. [BAR COUNSEL] Mr. Bailey, is it your contention that when you discussed this matter with Mr. Miller and you subsequently received that Biochem stock, that money was transferred to you in fee simple?

A. Yes, Effectively it was.

* * *

Q. It was a done deal why?

A. Because they chose to transfer it in fee simple to a non trust account and they knew it was a non trust account and they never said anything about getting it back.

TR 986.

Bailey recounted what happened at the May 17, 1994 Judge Paul off-the-record pre-plea meeting:

A. [BAR COUNSEL] Could you tell the Court what was said at the pre-plea?

Q. [BAILEY]: Yes. Very quickly we sat down, I don't believe Judge Paul was there. He came in . . . and he directed that Duboc be taken out. I think the court reporter walked in and he sent her out.

And Greg Miller began to explain that we had a change of plea to be taken, we had reached a plea agreement, it had been executed and some forfeitures were going to take place.

* * *

Ed Shohat had already taken a run at the Japanese stock and been turned away. He was told no, no, no. The defense has six million. That's enough.

* * *

And he [Miller] . . . said no, we have given six million dollars to Mr. Bailey and that is enough.

At which point I added, yes and final approval on whatever fees are taken, Judge, will be in your hands, and as of the moment no one has been paid anything out of that fund.

Q. So you acknowledge that you did in fact tell Judge Paul that final approval for fees would be in his hands.

A. I never have deviated from that.

Q. Why would Judge Paul need to approve fees that belong to you?

> A. Because the government had been instrumental in transferring them to me and they wanted to create a fiction [in case other counsel wanted a similar transfer.] . . . They can say, we don't approve fees, that's all up to the Judge.

TR 992-994. Bailey was asked whether the other witnesses who testified about the pre-plea meeting were "not telling the truth when they came in here?" Bailey replied:

> A. First of all they're in sharp disagreement. Two of them, I believe never heard the word trust. Third, Mr. [Pete] Foster [Bailey's pilot who was at the Judge Paul conference], who has taken a polygraph on the matter, didn't hear the word "trust."
>
> * * *
>
> I have not heard Judge Paul say anything, but I assure you the word "trust" was never used that day and I never heard it until I heard it from Greg Miller on January 19 [1996].

TR 995-996.[4]

> Q. Getting back to your position that you owned the Biochem Pharma stock in fee simple absolute, did you ever take the position that you only owned the appreciation of that stock.

---

[4] Judge Paul's testimony was precluded by a protective order. That fact was brought to this court's attention on May 24, 2000, in Bailey's unsuccessful "Emergency Motion for Abatement or Stay" of the Bar hearing that commenced on May 30, 2000.

A. Absolutely. I owned the appreciation. I was accountable for the original six million and could have been required to pay some of it back if I had become disabled as counsel in any way.

* * *

[I] was only accountable – and Miller made this plain – for the six million and no more.

TR 1003. Bailey stressed that the government never claimed entitlement to the appreciation until January 1996: "If you thought that any claim of appreciation belonged to anybody and you were a responsible lawyer for the government, I would have expected you to at least say so." TR 1005. The escalation of the Biochem Pharma, Inc. stock ("BCHE") was public knowledge; it traded openly on the NASDAQ. TR 1004.

AUSA Miller did not track the stock. As soon as Duboc pled guilty Miller "turned over the case to Tom Kirwin," TR 260. AUSA Kirwin paid no attention to the stock until "January of '96:"

Q. [D]id you keep track of what that stock was doing, what kind of performance it was enjoying?

A. [AUSA KIRWIN] No, I assume it was doing good. Mr. Bailey never said he didn't have money to deal with the estates.

Q. Did you ever ask him how the stock was doing?

A. Never did.

TR 218-219. Kirwin knew that Bailey had made arrangements to get a loan "against the value of the stock" and that Bailey "had sold some of the stock" in 1995. TR 218.

Bailey's post-May 1994 efforts to maintain and attempt to liquidate the French properties were in the best interests of both his client, who wanted to cooperate in the hope of favorable treatment from Judge Paul, and the government, which wanted to avoid "the laborious treaty process and all the international paperwork" it would have taken to turn the French properties into cash. TR 417-418. In carrying out his task, Bailey "was doing a terrific job." (TR 559) (Shohat testimony.).

Duboc, a demanding client, consulted many lawyers, and in late 1995 changes were in the wind.

## B. JANUARY 1996 AND ITS AFTERMATH

In October or November of 1995, Bailey told AUSA Kirwin that an attorney for the Coudert Brothers law firm was coming into the Duboc case. In early January 1996, that firm filed a motion for substitution of counsel, which was set for hearing on January 11, 1996. TR 159-160.

On January 4, 1996, Bailey wrote a letter to Judge Paul relating a conflict on January 11 because of another case, and "taking the liberty of advising Your Honor by this letter the nature of my concerns for the welfare of my client – Claude Duboc – as he transitions to a new lawyer." Appendix B; Bar Exh. 12. The letter, which was not copied to anyone ("I have sent no copies of this letter to anyone, since I believe its distribution is within Your

Honor's sound discretion"), is one of the bases of the Bar's Seventh Allegation of Misconduct.

Kirwin attended the January 11, 1996 hearing before Judge Paul. He had just learned that the Coudert Brothers firm had filed an action in Switzerland, freezing Bailey's account that held the Biochem Pharma stock, and Bailey told him that Coudert Brothers alleged the stock belonged to Duboc. TR 163-164. Kirwin told Judge Paul that the funds belonged to the United States, not Duboc, and then a lawyer standing in for Bailey said that "Bailey considered . . . that those stocks were his." TR 164. The substitution was granted, and after a bench conference and conferences among the United States Attorneys, Kirwin reached Bailey in New York "and he [Bailey] told me, in fact, that was his position, that the government had given him that stock and he had the interest in those stocks." TR 167. Kirwin "[t]old him that wasn't our position" (TR 168), and after consultation with Coudert Brothers, they appeared before Judge Paul who, on January 12, 1996 entered an Order that concluded:

> All monies, real and personal property and other assets received by Bailey from or on behalf of Duboc, including the aforementioned shares of Biochem Pharma stock shall be frozen as of the date of this order and no further disbursement of any of these funds shall be made unless authorized by this Court.
>
> DONE and ORDERED in Chambers this *12th* day of January, 1996.

Appendix C; Bar Exh. 1; TR 167.

Kirwin spoke to Bailey on the 16th, and Bailey went to Tallahassee on the 19th to meet with Greg Miller and Kirwin:

> A. [KIRWIN]: Generally speaking, the discussion was Mr. Bailey saying that we had given him the stock and Mr. Miller saying that we hadn't given him the stock. It was more complex than that but it boiled down to that's what it was.

TR 172, On the following Monday, the government filed an emergency motion for return of the property. TR 174. AUSA David McGee took over the prosecution of that, and subsequent proceedings, before Judge Paul. TR 174.

David McGee had not been involved in the April 1994 discussions with Bailey, but he had been consulted then by AUSA's Miller and Kirwin about the "propriety" of Bailey being given fees from forfeitable assets in light of the "mixed" case law. TR 43-44. McGee went to the library of the U.S. Attorney's office and met with Bailey. He told Bailey:

> We would not set the fees, we would not take a position that he was entitled to fees, that his argument was with the Judge, and whatever the Judge did he did and it would be without the interference of the United States.

TR 47.

On Sunday, January 21, 1996, Bailey faxed Judge Paul a seven-page letter prompted by the January 19, 1996 meeting. He wrote:

> The problem is neither complex nor very difficult but it is probably unique in some respects.

> The issue presented is this: Did the language or conduct of the parties – Mr. Miller and myself, since no one else was privy to our conversation create a trust of some sort on April 26, 1994, and if so what were its terms?

Appendix D; Bar Exh. 17. Bailey explained his understanding that he would have to accept the "downside risk" (Miller had called it a "gamble." TR 353-354) and that "I was entitled to protect myself in any way I saw fit including a sale of all or part of the shares. Once again, I agreed. There was no talk whatsoever, about the government participating in any appreciation of the value of the stock should I choose to risk holding all or part of it." Bailey continued:

> I viewed that as money held by me as an account in which the United States had an interest to this extent: after the payment of costs associated with the case and fees approved by Your Honor, any balance of the $5,891,352 remaining would revert to the United States.
>
> * * *
>
> In the reasonable belief that I was entitled to the benefit of my sole management of the investment – always protecting the sum with which I was entrusted – I have made substantial changes of position financially. It would be totally unfair for the government to achieve some retrospective creation of an imagined "trust" of the shares in view of the facts set forth above.

Appendix D, pp. 5-7.

The January 21, 1996 letter is also a subject of the Seventh Allegation of Misconduct, as is the May 10, 1996 Affidavit filed by Bailey in support of a motion to recuse

Judge Paul from the contempt proceedings which had been initiated against him, especially because Judge Paul was actually a witness to the critical May 17, 1994 meeting, and . . .

> in view of the fact that *the Court* decided that no court reporter need be present or other record of the proceedings made. Since the court put nothing on the record once counsel entered the courtroom, a strong inference arises that there was nothing of consequence to record; certainly nothing so calamitous as an illegal and unenforceable trust over which the Court was expected to preside.

Appendix E, p. 5; Complaint Exh. 6 (emphasis in original). Judge Paul declined to recuse himself; a decision that was affirmed on appeal. *United States v. Bailey*, 175 F. 3d 966 (11th Cir. 1999).

Judge Paul had issued an Order on January 25, 1996 ordering Bailey to appear on February 1, 1996 and to "bring with him all shares of stock of Biochem Pharma, Inc. held by him or others . . . and to produce all bank records . . . pertaining to all assets, or proceeds from the sale/mortgage/pledge/hypothecation hereof, received directly or indirectly, as attorney or agent for Claude Duboc." Appendix F; Bar Exh. 2.

The outgrowth of that hearing was Orders of Contempt directing Bailey "to pay back the money he had taken from the United States and make a complete accounting of all the assets that he had obtained from Mr. Duboc in trust for the United States." TR 62, Bar Exh. 3, 4. Subsequent hearings led to Bailey's incarceration for noncompliance with Judge Paul's orders, "When Bailey did

not comply, the district court jailed Bailey for contempt. Bailey was released after 44 days when he substantially complied with the order." *United States v. Bailey*, 175 F. 3d at 968.

Thereafter, Bailey sued the United States in the United States Court of Claims, pursuant to the Tucker Act, 28 U.S.C. § 1491. That breach of contract action, in which Bailey "alleges that the government agreed not to seek forfeiture of this stock, which according to the plaintiff, was transferred to [Bailey's] account 'unconditionally and in fee simple,' " and that " 'there were no discussions of any kind concerning Bailey's serving in any kind of trustee capacity with respect to the stock' " remains pending. *Bailey v. United States*, 40 Fed. Cl. 449, 450 (1998). The government's motion to dismiss that case was denied. While the Court of Claims judge stressed "that this opinion is not a disposition on the merits of the plaintiff's allegations, which raise a number of difficult and sensitive issues," she concluded that Bailey's complaint successfully alleged a breach of contact (*id.*, 40 Fed. Cl. at 461). The Court of Claims discovery depositions of high ranking Justice Department officials and DEA Agent Carl Lilley have been made part of the record in this case. *See* Order of January 18, 2001. Their testimony as to the "trust" claimed by Miller (and Shohat) is set forth below.

1. **LINDA SAMUEL**

Linda Samuel was, in 1994, Special Counsel in the Department of Justice Asset Forfeiture and Money Laundering Section. August 24, 2000 Deposition of Linda Samuel, p. 7, taken in *Bailey v. United States*, United States

Court of Federal Claims, No. 96-666c. She testified that she was contacted in May 1994 by the United States Attorney's Office in Tallahassee and "asked if I would assist them in the foreign forfeitures." *Id.*, p. 8.

BY MR. HORWITZ:

Q. Did they ever discuss – did any of the assistants [Assistant United States Attorneys] ever discuss Biochem Pharma stock with you at all?

A. Yes.

Q. And in any – with whom did you discuss Biochem Pharma stock, among the Assistant US Attorneys for the Northern District of Florida?

A. With Dave McGee, with Jimmy Hankinson, and with Tom Kirwin.

Q. Was that conversation with all three at once or a series of conversations?

A. Those would be different conversations over a period of years.

Q. In the conversations with Mr. McGee, in which the subject matter of the Biochem Pharma stock was discussed, did Mr. McGee ever say that the stock had been given to Bailey in trust?

A. He never said that.

Q. Did he ever show you any written trust agreements concerning the Biochem Pharma stock and Mr. Bailey's receipt of the stock?

A. No.

Q. In any of your conversations with Mr. Hankinson, concerning the Biochem Pharma stock, did Mr. Hankinson ever relate that the stock was given to Mr. Bailey in trust?

A. No.

Q. In relation to your conversations with Mr. Kirwin, concerning the Biochem Pharma stock, did Kirwin ever say the stocks were given to Mr. Bailey in trust?

A. No.

Q. Did Kirwin ever say there were any trust documents in relation to the Biochem Pharma stock and Mr. Bailey?

A. No.

*Id.*, pp. 11-13.

## 2. GERALD MCDOWELL

Gerald McDowell is (and was in October 1994) the Director of the Asset Forfeiture Office of the Department of Justice, He is Linda Samuel's supervisor.

August 24, 2000 Deposition of Gerald McDowell, in *Bailey v. United States,* United States Court of Federal Claims, No. 96-666c.

Mr. McDowell confirmed that Ms. Samuel told him "that Miller had indicated to Bailey, in words or substance, that if the price of this stock went down that was being given to Bailey, it would be his risk or there would be no other money there to serve the purposes for which he was being given the stock[.]" McDowell Deposition, p. 35. He confirmed that he was never told by anyone in the United States Attorney's Office for the Northern District of Florida that Bailey was given the Biochem Pharma stock in trust, and that there were no documents indicating that the stock had been provided to Bailey in trust. *Id.*, pp. 14, 26.

### 3. CARL LILLEY

The September 25, 2000 deposition of DEA Agent Carl Lilley in the United States Court of Federal Claims proceeding produced these colloquies with Bailey's Court of Federal Claims counsel:

> Q. In this meeting following the [May 17, 1994] hearing and conversation with Judge Paul, was there any mention by Mr. Miller that Bailey had been given the Biochem Pharma stock in trust?
>
> A. No, I don't think so. I don't recall that.
>
> Q. Did anyone else present for this meeting state in your presence that Bailey was given the Biochem Pharma stock in trust?
>
> A. No.

Lilley Deposition, p. 136.

> A. So Bailey had to provide a bank account number and Duboc had to sign a letter to

> the fiduciary or to the bank to transfer that account. So there were discussions along that line the 25th and 26th [of April 1994].
>
> * * *
>
> Q. In those discussions, did anyone suggest that any of the documentation that was being prepared indicated that Bailey was receiving the stock in trust?
>
> A. No, I don't think there was any documentation like that.

*Id.*, p. 149.

**4. MARY LEE WARREN**

The August 16, 2000 deposition of Mary Lee Warren, Deputy Assistant Attorney General, and her production of and identification of a May 19, 1994 memorandum from P. Michael Patterson, United States Attorney for the Northern District of Florida, addressed the Biochem Pharma stock. Ms. Warren, the supervisor of both Ms. Samuel and Mr. McDowell, was responsible for oversight of the Department of Justice Asset Forfeiture Money Laundering Section. *Id.*, p. 7. She was a subject of Bailey's May 24, 2000 "Emergency Motion for Abatement or Stay" of the May 30, 2000 Referee hearing. In that Motion to this Court Bailey set forth the facts that Judge Paul had refused to testify, and that the government refused to produce a memorandum to Ms. Warren on the Duboc case. This Court denied Bailey's emergency motion on May 26, 2000. Subsequently, Bailey was able to depose Ms. Warren and obtain the memorandum in the Court of Federal Claims case.

The memorandum to Ms. Warren from the United States Attorney was to "[m]ake you aware of and highlight the Duboc case, which by any measure we believe is the premier case currently being prosecuted in the United States, when measured by profits, quantity of drugs, and/or sophistication of operation." *Id.*, p. 25. Not a word in the memorandum mentioned a trust (pp. 25-27), nor was a "trust" mentioned in oral conversations with Ms. Warren:

> Q. Did Mr. Patterson . . . or Mr. Miller who was apparently present according to the memo, did they discuss with you the fact that while Mr. Duboc was in custody that the government prepare[d] [sic] a document that caused Duboc to transfer his 602,000 shares of Biochem Pharma stock to Mr. Bailey and at the same time 3.5 million in funds to a DEA account in Panama City?
>
> A. I know nothing of that, no. Just to be absolutely clear, I know that there was this stock involved. I don't know what the agreement was, but I certainly don't recall ever seeing any documents or having it described to me.

Warren Deposition, pp. 33-34.

Ms. Warren said at her August 2000 deposition that she never knew until "the last couple of days" that the United States Attorney's Office had, in 1994, prepared the transfer documents that caused the Biochem shares to be transferred to Bailey. *Id.*, p. 34.

* * *

Because the Biochem Pharma, Inc. shares, the May 17, 1994 pre-plea conference with Judge Paul, and Bailey's January 1996 letters to Judge Paul are at the heart of the case, and constitute the basis for most of the allegations against Bailey, the Statement of Facts has focused on those events. We address the facts relating to the First Allegation of Misconduct, and Bailey's deposits of the funds obtained *via* loans against, or sales of, the Biochem Pharma, Inc. stock, in the Argument portion of this Brief.

## SUMMARY OF ARGUMENT

The heart of The Florida Bar's Complaint against F. Lee Bailey was the claim that he had violated his duties under an "oral trust." There was no such trust. There was no clear and convincing evidence of such a trust. Therefore, the Referee's Report and recommended sanction should be rejected.

In April 1994, the United States acting through Assistant United States Attorneys for the Northern District of Florida, arranged the transfer of nearly six million dollars of stock to F. Lee Bailey. (App. G). The stock belonged to Bailey's client, Claude Duboc. The government authorized, approved, and typed the transfer authorization letter. TR 409. The letter contained no words of "trust," although the government knew how to create a trust agreement, and in another transfer letter relating to stock in a Hon Kong corporation, used the word "trustee." TR 414.

Bailey's understanding of the arrangement was that he could use the stock as he saw fit to manage and liquidate Duboc's French properties, so that the proceeds

of those properties could be forfeited to the government as part of Duboc's plea agreement, If, after accomplishing those tasks, there was money left United States District Judge Maurice Paul would approve Bailey's fees, and any remaining balance would revert to the United States. (App. D, p. 6; TR 1003). The government recognized that Bailey was taking a "gamble" (TR 353-354), and if the stock went to zero, Bailey would be bereft of fees.

In January 1996, Duboc decided to change counsel, and the government, which knew that Bailey had sold some of the stock and pledged some as collateral for loans, learned that the stock had appreciated and Bailey believed the appreciation was his because he had taken the risk relating to the stock. The dispute led to a letter written by Bailey to Judge Paul on January 4, 1996, Orders issued by Judge Paul on January 12 and 25, 1996, and a letter from Bailey to Judge Paul on January 21, 1996. Those letters and Orders, Bailey's expenditures of monies, and his testimony before Judge Paul gave rise to some of The Bar's allegations against Bailey; but they, too, are an outgrowth of the "trust" dispute.

One Assistant United States Attorney said he told Judge Paul at a pre-plea conference in May 1994 that the stock had been given "in trust." TR 259-260. Another AUSA, who made the only notes of the meeting, said "I don't remember that the words 'in trust' were ever used. (Kirwin Deposition, Supplemental Record, pp. 266-268). Bailey and an employee of his said "trust" was not mentioned. A Duboc co-counsel, who was later discharged, said it was. TR 520. Justice Department supervisory personnel said they were never told by any AUSA that the

stock was given "in trust." (Supplemental Record, Deposition of Samuel, p. 11-13; McDowell, pp. 14, 26; Warren, pp. 25-27, 33-34).

An oral trust agreement requires evidence that is "so clear, strong and unequivocal as to remove every reasonable doubt as to its existence." *Sottile v. Mershon*, 166 So. 2d 481, 483 (Fla. 3d DCA 1964). *See also Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative*, 52 So. 2d 670, 674 (Fla. 1951) (proof should be "clear, positive and unequivocal").

The proof in this case failed the oral trust test and the clear and convincing standard for Bar disciplinary proceedings. The Referee's Report should be rejected.

The Referee also erred in excluding polygraph evidence that confirmed Bailey and his employee were telling the truth about the lack of a trust, and she erred in excluding the expert witness testimony of the former long-time Ethics Director of The Florida Bar, who concluded that Bailey's handling of the stock proceeds, and his letters to Judge Paul, and his testimony before Judge Paul did not violate the Rules Regulating the Florida Bar The one allegation admitted by Bailey – that the proceeds of the government-authorized sale of some Japanese stock should have been placed in trust on the way to the government – was a technical violation, and the former Ethics Director's testimony should have been admitted as to that subject, too.

In sum, the evidence presented, and the evidence excluded, require rejection of the Referee's Report and sanction recommendation.

## ARGUMENT

### I.

### THE FINDINGS OF MISCONDUCT AND THE RESULTING RECOMMENDATION OF DISBARMENT MUST BE REJECTED, BECAUSE THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT A TRUST HAD BEEN CREATED WITH REGARD TO THE BIOCHEM PHARMA STOCK THAT WAS TRANSFERRED TO BAILEY

Allegations of Misconduct 2, 3, 4 and 5 of the Bar's Complaint, and the Referee's findings as to those counts, turn on the existence of a "trust" relationship having been established when the Biochem Pharma, Inc. shares were transferred to Bailey in April 1994. If there was no "trust," Bailey's handling of the Biochem stock and its proceeds did not violate Bar Rules, and his testimony was truthful.

Not a single document supported the creation of a trust.[5]

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[5] We anticipate the Bar will point to Bailey's letter of January 21, 1996 to Judge Paul in which Bailey wrote that he told Shohat he "had in principle agreed to hold the funds in the nature of a trust," and that he "viewed the money held by me as an account in which the United States had an ultimate interest" as written evidence of the existence of a trust agreement. But the Bar would be both misreading and reading too much into these phrases, because Bailey made clear in that letter and in his testimony that the only duty he had was to account for the expenses and get approval for the fees to be paid from the $5,891,352; if there was a remainder, that reverted to the government: "I viewed that as money held by me as an account in which the United States had an ultimate interest, *to this extent: After the payment of costs associated with the case, and fees approved*

Faced with that uncontroverted fact, and the indisputable fee simple language of the transfer letter, the Referee used euphemisms: "form of trust" (Appendix A, p. 5 ¶ 3a); "Nature of a trust (*id.* at p. 6, ¶ 3d); "Nature of a trust (*id.* at ¶ 3d); "Nature of a trust" (*id.* at ¶ 3g); "Biochem shares entrusted to him" (*id.* at 13 ¶ 1); "A trust arrangement" (*id.* at 5, ¶ 3c).

We recognize that the Assistant United States Attorneys said that they believed that Bailey was obligated to return the Biochem Pharma, Inc. stock. But the test is not what they thought; it is whether there was "clear and convincing" evidence that Bailey thought there was a trust, and that an oral trust had actually been created.

> "Clear and convincing evidence requires that the evidence found must be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit; and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, *without hesitancy* as to the truth of the allegations sought to be established."

*State v. Mischler*, 488 So. 2d 523, 525 (Fla. 1986) (emphasis supplied), *quoting Slomowitz v. Walker*, 429 So. 2d 797, 800

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*by your Honor, an[y] balance remaining would revert to the United States.*" Appendix D, p. 6 (emphasis supplied). If the stock had gone to zero, Bailey would have been broke. He took the "gamble" (Miller, TR 353-354), and no document supported the contention that Bailey was foreclosed from the upside of the transfer authorized by the government.

(Fla. 4th DCA 1983).[6] The Court's application of the Slomowitz definition to the sentencing guideline departure requirement of "clear and convincing reasons" used language highly pertinent to the "oral trust" inquiry in this case, In *Mischler* Justice Adkins wrote:

> Accordingly, "clear and convincing reasons" require that the facts supporting the reasons be credible and *proven beyond a reasonable doubt.* The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, *without hesitancy,* that the departure is warranted.

*State v. Mischler,* 488 So. 2d 525 (emphasis supplied).[7]

The "oral trust" standard is similar. In *Sottile v. Mershon,* 166 So. 2d 481 (Fla. 3d DCA 1964), the plaintiff sought to have a trust declared for money paid to an attorney, maintaining "that the money was paid to T.A. Whiteside for a specific purpose under circumstances creating an oral trust agreement. . . . " *Id.* at 482. The circuit court found that an oral trust agreement was not

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[6] Although *Mischler's* test has been superseded by statute, and sentencing departures now only require a preponderance of the evidence, the Court's definition of "clear and convincing evidence" is still the applicable standard for explaining the meaning of the term.

[7] The "without hesitancy" definition is consistent with the Florida Standard Jury Instruction 2.03 on reasonable doubt: "if having a conviction it is one which is not stable but one which wavers and vacillates . . . ," and the federal reasonable doubt standard: "Act without hesitation in the most important of your own affairs." *See Eleventh Circuit Pattern Jury Instruction* 3. The point we make is that there is a *very high* quantum of proof required for proof of an oral trust.

established and the appellate court affirmed, stating the standard:

> In order to demonstrate error upon this record, the appellants would be required to show that the evidence to establish the oral trust was so clear, strong and unequivocal as to remove every reasonable doubt as to its existence. *Lofton v. Sterrett,* 23 Fla. 565, 2 So. 837; *Quinn v. Phipps,* 93 Fla. 805, 113 So. 419, 54 A.L.R. 1173; *Lightfoot v. Rogers,* Fla. 1951, 54 So. 2d 237; *Estey v. Vizor,* Fla. App. 1959, 113 So. 2d 576.

*Sottile v. Mershon,* 166 So. 2d at 483. *See also Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative,* 52 So. 2d 670 (Fla. 1951):

> In all cases wherein relief is predicated upon an oral agreement for an express trust in personalty or upon facts which might be contended to establish a constructive or resulting trust, proof of such an agreement or of such facts must be weighed cautiously and should be clear, positive and unequivocal. With reference to an express trust the general rules require at least a clear preponderance of the proof and many courts have held that the parol evidence must be of a conclusive, or well nigh conclusive, character. Of course, in the case of a resulting trust the rule is even stronger and requires proof sufficient to remove from the mind of the Chancellor every reasonable doubt of the existence of such a trust.

*Id.,* at 674.

No matter how one frames the clear and convincing standard, the evidence in this case does not meet it. The

testimony of the Bar's witnesses was not precise and explicit; it was not distinctly remembered, nor was it lacking confusion. The Statement of Facts details the contradictions. *See* pp. 9-29, *supra*. Two witnesses (Miller and Shohat) said Judge Paul was told there was a "trust." Four others (Kirwin, Bailey, Fuster, Lilley) testified that the word "trust" was never used. Others, in supervisory positions within the Justice Department, remembered clearly that they were not told of any trust. (*See* depositions in Supplemental Record). The critical document, prepared by the government (TR 218), contained no indication of a trust: "As to the shares of Biochem send them to the following account: Credit Suisse . . . Account #0267-15427-52." Appendix G.[8]

The Referee was "not swayed by the Respondent's argument that the lack of written agreement supports his position that no trust was established." Appendix A, p. 9, ¶ 14. But the burden was not on Bailey, it was on the Bar to prove, without hesitation, that an oral trust was established. Bailey's argument is not hinged upon the lack of a written agreement; it is founded upon the fact that the only written agreement *did not* establish a trust and that the Bar's witnesses were all over the lot on whether a "trust" had even been mentioned, and on what was said to Judge Paul. Indeed, any fair reading of the record is that Miller's and Shohat's uses of the word "trust" are

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[8] The government knew how to create a trust agreement. See TR 414-417, where AUSA Atchison explains the preparation of Duboc letters to transfer stock of Hong Kong corporations to Bailey, and the fact that "they specifically name that 'transfers to be made to my attorney, Mr. F. Lee Bailey, *as my trustee.*' " (TR 414) (emphasis supplied).

completely inconsistent with the other evidence: the note and testimony of Kirwin; the recollections of Lilley, Fuster, Bailey; the silence of Miller, Kirwin and Patterson to the high level Justice Department officials about any "trust," the lack of any interest in the price of the stock by any government official from April 1994 until January 1996.

Nor was the Referee right when she wrote that Bailey's position was not "consistent with the premise that ultimate approval and payment of fees would rest with Judge Paul" and that Bailey "has never denied that approval of fees and expenses would have to be sought from Judge Paul." Appendix A, p. 14, ¶ 7. Bailey's position is consistent because he has never doubted or denied that there would be an accounting and a fee approval *vis a vis* the $5,891,352 transferred value of the Biochem Pharma stock. *See* Appendix D, p. 5; TR 1003. The real question relates to what would happen if the stock became more valuable. AUSA Miller acknowledged Bailey was assuming a risk:

> A. I said that was the only account that we were making available to him, that stock fund; that if it went down he was risking that he was not going to be able to pull out the monies that he needed to manage those properties; and possibly not have the money in that fund to pay his fees, that they were going to make available to pay his fees.

TR 351. Miller also said he gave Bailey a choice – that cash could be transferred to him – but that Bailey took the

stock. TR 351-352. Having taken the risk, Bailey believed he was entitled to the benefit:

> A. [BAILEY]: The first time I was ever informed that the profits were not mine was on January 19, 1996 when Mr. Miller's first tack was to tell me that Claude remembered this was a trust. Not that we had talked about it, but that Claude remembered.
>
> And I said, that's not a very credible source to depend on, and I'll tell you right now its not true. We broke for lunch, and when he came back he said for the first time, he [Miller] said, you know you were given a forfeitable asset.

TR 892-893. Bailey knew, and had every reason to believe, that the stock was not a forfeitable asset because "it could never have been deposited in the Swiss account without creating a serious crime under Swiss law," a fact conveyed to Kirwin in June 1994 (TR 896-897), and because "you may not give money to a defense attorney out of forfeitable assets without the approval of the Deputy Attorney General, and I knew they didn't have it." TR 897. *See United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989) in which the Court, addressing the Comprehensive Forfeiture Act of 1984, Title 21 U.S.C. § 853, said "all assets falling within its scope are to be forfeited upon conviction, with no exception existing for the assets used to pay attorney's fees – or anything else, for that matter." *Id.* at 603-604, 109 S. Ct. at 2660-2661.

Here the government's approval of Duboc's pre-plea transfer of the Biochem stock to Bailey evaded these strictures and gave Bailey an unencumbered interest and

the right to consider its appreciated value to be the reward for the risk he accepted when he agreed to maintain, manage and liquidate the forfeitable properties and have Judge Paul approve his fees, assuming the stock did not lose its value.

The Referee's recommendation of disbarment is primarily based upon her finding that Bailey "misappropriated" "commingled" (Appendix A, p. 9, ¶ 15), improperly "expend[ed]" (*id.* at p. 10, ¶ 12), and engaged in "self dealing" (*id.* p. 14, ¶ 13) with respect to the Biochem Pharma stock. These findings and the drastic sanction recommendation are premised on the "trust" she found was created. That finding was clearly erroneous. There was no "trust." There was no clear and convincing evidence of a "trust." There was not evidence that would cause one, without hesitation, to conclude there was a "trust."

Viewed in the light most favorable to The Bar, the evidence reflects, at most, a misunderstanding. Toni Marie (Kennedy) O'Brien, a lawyer who worked with Bailey on the Duboc matter, recalled the moments when Bailey first heard that the government claimed the appreciated value, and that there was a trust. AUSA Atchison called her in December 1995 and she related her subsequent conversation with Bailey:

> A. I said Mr. Atchison just called, he's looking for some account numbers on the Biochem stock, he said that this is a good time to sell it because of substitution of counsel or the upcoming substitution of counsel.
>
> Q. Did Mr. Bailey say anything in response to that?

A. Yes.

Q. What did Mr. Bailey say?

A. Well he got very mad and said, I'm entitled to the upside gain on that stock. He snapped at me. I mean, I felt defensive you know. I felt a – well I didn't say anything different, you know, don't shoot the messenger, I'm just passing it along. And he said, well, you know, I'm entitled to the upside gain. I took the downside risks, I'm entitled to the appreciation, something to that effect.

O'Brien Deposition, pp. 30-31.[9]

Ms. O'Brien went to the January 19, 1996 meeting at the United States Attorney's Office in Tallahassee. "It turned out the focus of the discussion was, you know, Mr. Bailey versus the government attorneys saying its my stock, its my stock. Umm, and that's the first time that I heard trust come up, that the stock was given to Mr. Bailey in trust." O'Brien Deposition, pp. 86-87.

Even if one credits the government's belief in its "trust" theory, disbarring a lawyer when he had a reasonable basis for a different belief is wrong. The government showed no interest in whether the stock was appreciating; the Assistant United States Attorneys made no effort to confirm, either orally or in writing, their "trust" view, nor did they make any effort to document the basis for

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[9] A motion to supplement the record with this Court of Claims deposition has been filed contemporaneously with this Brief The acceptance of the deposition would be consistent with the Court's Order of January 18, 2001.

their transfer of nearly six million dollars in stock. If Bailey was wrong, on this record, his error does not merit disbarment.

## II.

## THE EXCLUSION OF FAVORABLE POLYGRAPH EVIDENCE AND FAVORABLE EXPERT WITNESS TESTIMONY REQUIRES RECONSIDERATION OF THE FINDINGS AND SANCTION RECOMMENDATION

### A. THE POLYGRAPH EVIDENCE

Bailey sought to introduce polygraph examiner testimony establishing that Bailey's pilot, who had been present in Judge Paul's chambers, was not deceptive when he said that he did not hear the word "trust" mentioned by anyone at the May 17, 1994 pre-plea conference. TR 721. Bailey also sought to admit the results of his own polygraph, which established that he was truthful regarding his understanding of the stock transfer to him. The Referee denied admission of the testimony because "in Florida, polygraph testimony is not admissible." TR 724.[10]

Polygraphs have been considered in Bar proceedings. *See The Florida Bar v. Pavlick*, 504 So. 2d 1231, 1233 (Fla. 1987). See also *The Florida Bar v. Sepe*, 380 So. 2d 1040 (Fla. 1980), in which the Florida Bar's Petition for Approval of

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[10] She commented that Bailey's polygraph report was tardy, "[s]o I'm inclined just to exclude that on a procedural ground" (TR 723), but it appears that her belief in the inadmissibility of polygraphs is the actual basis for the decision. TR 724.

Conditional Guilty Plea related that polygraphs were taken by the respondent and his accuser, and "neither of them showed reaction indicative of deception." *Id. See also The Florida Bar v. Rayman,* 238 So. 2d 594, 596, n.1 (Fla. 1970).

The Referee refused to follow *Pavlick,* finding it to be distinguishable. TR 724. *Pavlick,* turned on whether he was telling the truth when he denied in the Bar proceeding that he was guilty of being an accessory after the fact to a misprision of a felony despite his federal *Alford* plea and adjudication of guilt as to the crime. The polygraph test introduced in the Bar proceeding "bore out Pavlick's testimony" that he did not commit the crime. 504 So. 2d at 1233. The Court held that "due process" supported the referee's decision to admit the polygraph results as "evidence in mitigation." *Id.* at 1234. Here due process requires consideration of the polygraph evidence as to the merits and mitigation.

F. Lee Bailey's career is in the balance. If there was no trust, if Bailey's understanding of the stock transfer arrangement had a reasonable basis, at the least that militates against the sanction. Polygraph evidence is admissible in the federal courts in this circuit. *United States v. Piccinonna,* 885 F.2d 1529 (11th Cir. 1989). The Fourth District Court of Appeal certified the question of polygraph admissibility to this Court in *State v. Santiago,* 679 So. 2d 861 (Fla. 4th DCA 1996).[11] The Fifth District

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[11] There is no reported subsequent history to *Santiago.* The certified question: "Are the results of polygraph tests inadmissible in evidence as a matter of law?" (679 So. 2d at 863) remains unanswered.

Court of Appeal has approved the use of periodic polygraphs for those on probation for sex offenses. *Cassamassima v. State*, 657 So. 2d 906 (Fla. 5th DCA 1995) (en banc). The Supreme Court of the United States addressed the polygraph issue in *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998), and upheld Military Rule of Evidence 707, prohibiting polygraph evidence in courts-martial. But three justices joined in Justice Kennedy's concurrence:

> I doubt, though, that the rule of per se exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does. . . . And, as Justice Stevens points out, there is much inconsistency between the Government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests.

*Id.* at 318, 118 S. Ct. at 1269 (Kennedy, J., concurring). Thus, combined with Justice Stevens' dissent five justices believe it unwise to *per se* exclude polygraph evidence.

As the Fourth District pointed out in *Santiago*, polygraph evidence has become more accepted. Whatever the ultimate answer may be as to the use of polygraphs in all cases, the denial of its use here violated Bailey's due process right to present evidence in mitigation. *Pavlick, supra* p. 45. While we contend that the evidence does not support the Referee's finding of a "trust," if this Court concludes otherwise, the exclusion of the polygraph evidence was error here because the polygraph evidence could have tipped the "clear and convincing evidence" scale in Bailey's favor. Therefore Bailey is entitled to have

this Court consider the favorable polygraph evidence and find that it confirms Bailey's position that the Referee erred in finding that a "trust" had been established.

## B. THE ETHICS EXPERT'S TESTIMONY

Bailey also sought the admission of expert testimony from Timothy Chinaris regarding application of the Bar Rules to the alleged Bailey conduct. Chinaris was the Ethics Director of The Florida Bar from 1989 to 1997. Chinaris' testimony was rejected by the Referee because "From this Court's perspective as a Referee, any testimony provided by a lawyer which purports to be expert testimony [on the Rules Regulating the Florida Bar] will provide no assistance to this Court as required by the express mandate of Florida Statute 90.702." TR 616-618.

That cramped view of Section 90.702 foreclosed the Referee from considering Chinaris' "specilized knowledge." In the Referee's mind, all Florida lawyers have knowledge of the Rules, therefore "permit[ting] lawyers to give expert testimony regarding the meaning of the rules regulating the Florida Bar and their application to this case" would have rendered her role "superfluous." TR 617. If the Referee were right, the Florida Bar's "Ethics Hotline" and The Florida Bar's extensive advisory process are superfluous. By "knowledge, skill, experience and training" Chinaris was qualified to testify concerning the ethical propriety of Bailey's conduct. His Expert Interrogatories Response had been proffered (TR 621, 808-809) and is reproduced in Appendix H to this Brief. He sat through the entire Bar hearing, TR 501-502. No principled

basis justified the Referee's grant of "the Bar's ore tenus motion to exclude [Chinaris] from testifying." TR 618-619.

The Chinaris proffer is persuasive. Chinaris' expert opinion addressed each purported violation. It detailed the extensive materials he had reviewed. It stated the reasons why Bailey's use of funds transferred to him was not unethical; why his letters to Judge Paul did not violate the Rules of Professional Conduct, and why the one transgression (Count I, the passage of proceeds from the Japanese stock briefly through Bailey's personal account on its way to the government) was "at most, a technical violation of the trust accounting rules." Appendix H, p. 2, ¶ (iii)(A).

This Court should consider Chinaris' proffered expert interrogatory answers and find that they undermine the Report both as to its findings and recommended sanction.

## III.

## THE FINDINGS OF FALSE TESTIMONY, COMMINGLING, DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS, CONFLICT OF INTEREST, AND MISAPPROPRIATION ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, AND THE RECOMMENDATION OF DISBARMENT SHOULD BE REJECTED

The Referee did not like Bailey. She rounded up various historical comments and re-wrote them to say " 'The Respondent is a liar.' This Referee concurs." Appendix A, p. 23.

The evidence does not prove Bailey lied about the "trust." And, if there was no "trust," then Bailey cannot be found guilty of misappropriating and commingling the sales and loan proceeds of the Biochem Pharma stock.

The evidence does not prove Bailey lied about the sale of the Japanese stock that had been transferred to him, and its layover in his Barnett Bank account. His candor was unconditional: he acknowledged that "[i]t was to be a conduit for delivery to . . . the U.S. Marshal . . . [a]nd very frankly, I wasn't thinking of the United States as a client at that time. Probably should have put it in a trust account, but I didn't." TR 959.

Nor did the evidence prove that Bailey lied about his knowledge of Judge Paul's orders of January 12 and 25, 1996. The Referee concluded that Bailey's "assertions that he did not see the January 12 and January 25 orders prior to February 2 are patently ludicrous." Appendix A, p. 13, ¶ 10. Bailey's cross-examination explanation about the orders, how he heard about them, what he knew and thought, is at pages 1078-1082 of the hearing transcript. The Referee's disbelief was based largely on Bailey's January 21, 1996 letter to Judge Paul, which the Referee quoted out of context and concluded: "Of course these assertions [to Judge Paul] could not have been made *unless* the Respondent had seen the January 12 order." Appendix A, p. 12 ¶ 9(d) and (e) (emphasis in original).

Bar counsel's cross-examination led the Referee to err:

> Q. [BAR COUNSEL]: Well Mr. Kirwin must have told you at some time. It's in your letter to Judge Paul on the 21st.

A. No, not in my letter to Judge Paul on the 21st. Have you read the first paragraph of that letter?

Q. You read footnote 1, Mr. Bailey. You read it in court. It will stand for that.

A. Does it not say that "on January 16 your order came to my attention"? Doesn't say I read it.

Q. Mr. Bailey, *does it also say that Mr. Kirwin told you* that you had to freeze everything?

A. *No.*

Q. That's not what footnote 1 says?

A. No.

Q. Okay. We'll let the letter speak for itself.

TR 1091-1092 (emphasis supplied). The letter is at Appendix D. It is as Bailey stated; it does not say he saw the order, and footnote 1 says that he thought the order that he had heard about *"was the product of my telephonic offer* to AUSA Kirwin on Friday January 12 . . . to 'freeze everything' until we could meet with you and solicit your direction." Appendix D, p. 1, n. 1 (emphasis supplied).

Bailey also explained that there was nothing in the January 25, 1996 Order prohibiting distribution of the proceeds of a loan made against the shares for which he was personally liable (TR 939), and that from January 12 through January 24 "no Duboc money was spent." TR 1113. The money expended from January 25 to February 26 from Bailey's personal account was not covered by the January 25 Order, which Bailey accurately said "does not freeze my account." TR 1114. *See* Appendix F, the January 25, 1996 Order. It does not freeze anything.

The Referee's distaste for Bailey's January 4 and 21, 1996 letters to Judge Paul (Appendix B and D) was sharp: "All this was done with the ludicrous presumption that the Respondent's opinion, as to the potentially displaced attorney, would be of any relevance or benefit to anyone." Appendix A, p. 17, ¶ 13(e). But Bailey sought to help, not hinder, his client. And how could he have "compromised his client" (Appendix A, p. 15, ¶ 10) by telling Judge Paul what he already knew in May 1994: that Duboc was a wealthy drug dealer who chose to cooperate because it was his only option, given the strength of the case against him? The January 4, 1996 letter should not have been an *ex parte* communication. But that transgression, and Bailey's entitlement to defend himself in his January 21, 1996 letter contesting the government's "trust" theory, do not create grounds for disbarment.

Indeed, this whole case comes back to the "trust." The Bar's Complaint is founded on the Bar's belief that Bailey had been given the Biochem Pharma, Inc. stock in trust. The Referee's findings, conclusions, and recommendations are constructed on the same premise.

Because that premise lacks clear and convincing evidentiary support, the Referee's Report must be rejected.

## CONCLUSION

For the foregoing reasons, the Amended Report of Referee should be rejected. If any of F. Lee Bailey's actions constituted misconduct, the sanction should not interfere with Bailey's ability to practice law, given his

reasonable belief that his actions were consistent with his agreements with his client and the government.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by FedEx to the following counsel of record this 20th day of February, 2001:

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## CERTIFICATE OF FONT SIZE AND STYLE

This brief is typed using a Times New Roman 14-point font, in accordance with Rule 9.210, Fla.R.App.P.

BRUCE ROGOW

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**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

| | |
|---|---|
| F. LEE BAILEY,<br>Plaintiff,<br>vs.<br>THE UNITED STATES,<br>Defendant. | No. 96-666C<br>(Judge Horn) |

* * *

[1801] THE COURT: We've just about come to the end of the trial, and it's now I guess my turn to talk a little bit and tell you what I need to close out this case and to review all of the testimony and the documentary evidence that's been introduced to the Court.

[1802] First let me thank you, all the participants, the lawyers, the paralegals, for what I think has been in many ways a very easy trial. It's always nice for me to have cases in which the lawyering on both sides is at the high end of the profession and where I don't have to deal with mechanical breakdowns on a regular basis.

Of course, we have lots of cases in which that's true. We have many situations in which lawyers simply don't know their way around the courtroom, and that becomes a much more difficult trial. We didn't have any of those problems here. Everybody was obviously competent and highly so and with good support from paralegals on both sides or investigators or whatever they chose to use as particular support.

As a result, I think we have had a trial that flowed relatively well. It obviously took a little longer than any of you all thought and probably than I hoped, although I projected this extra week a long time ago and reserved the courtroom for that reason. It just seemed to me, looking at the witness list early on, that it was going to be very, very difficult to complete it in the time allotted, particularly since I think all of us knew that this is a case that runs with very high emotion and in which credibility and bias would quite obviously be a question.

[1803] When you have that kind of testimony, the cross-examination generally takes a little bit longer and is not necessarily as predictable as it might be if all you're doing is eliciting simple fact testimony.

The theme of inconsistencies in here is obviously something that means that I'm going to need your help to point out, number one, what you think might be inconsistencies for one side and on the other what might not be inconsistencies. It goes in multiple directions. I mean, the arrows shoot back and forth from side to side on this issue on a lot of the witnesses on a lot of the evidence.

It's for that reason, and I think I've said this before, but I don't know that I can say it often enough. Your post-trial briefings really need to be incredibly precise, very specific references to trial transcript pages and lines, very specific references to exhibits, pages, paragraphs, so that I can follow what it is that you believe is going on here. I've got my own view. Each of you have your own view. Right at the moment I can honestly tell you I'm not sure how it all falls out.

You will see from the questions that I will throw out to you where some of my areas of concern are. Be very, very careful, and I say this whenever we get to this stage in a trial in which I really don't have a final answer for you. I might not rule from the bench very often. I've done [1804] it occasionally, but that's only when I really know what I think I'm going to end up with and have done the kind of work and don't need to redo and relook at the evidence in the way that I think is absolutely mandated by this case.

I'm going to have to do a very careful review, read and scrub of what we've heard and what we've seen. If you've looked at, and I'm sure you have because all good lawyers do, some of my opinions, you'll see that I'm not too casual about fact finding and that in fact, if anything, tend towards adding in lots and lots of detail. My reason for doing that, frankly, is, first of all, I think that's my job. I am the fact finder.

Second, of all, although it doesn't bother me when the Court of Appeals reverses me – that's their job – it is easier for them to make a decision if I have filled the opinion with fact and made findings and especially credibility findings. That is generally left to the discretion of the Trial Judge because it is the Trial Judge that has had the opportunity to observe and make decisions as the testimony is coming out as to whether or not somebody is inherently believable.

One of the things that I try very, very hard to do in going into this case, because, of course, there's been lots of discussion both in the motions that have preceded the trial and just in our status conferences and whatever,

[1805] in our settlement conferences that have a lot of emotion in it. I tried to walk in here, and I think successful did, without prejudging anything or anybody.

I have been surprised by myself in some of my reactions to some of the people. You will see when the opinion comes out I took very, very careful notes on bias and credibility and what I considered to be credible testimony. You will see when the opinion comes out that there are some disturbing elements as far as I'm concerned with respect to the credibility of some of the witnesses, and witnesses who I believe should have been unimpeachable starting from the beginning.

I've been a government public servant for many, many years in various capacities at the Executive Branch and then in the Judicial Branch, and I really do believe there is an incredibly high duty on the part of government officials to perform their responsibilities absolutely above impeachment and absolutely for the benefit of everyone, all citizens, and also to make sure that when confronted, comfortable or not, they will come up with what is an honest review of the events.

The comments that were made, the documentary evidence that's in, the biggest risk as I see it, and I heard a lot of it – I heard some of it in closing and heard some of it in the questions that were asked summarizing [1806] testimony. There is a very serious question about being sure to take all comments, particularly in the oral testimony – not so much in the written documents, but in the oral testimony – in context.

There was a fairly loose approach on the part of some people I think and at some points to take some comments

out of context or to broaden what was said into something that wasn't quite there, so when you do your briefings for me be very sure to include context for me so that I can really see where it's coming from.

I warn you that if I am uncomfortable with the context I am not at all shy in coming back to you for additional documentation or additional material that I might need to figure out the context, so bear this in mind as we get to what will be essentially the closing part of this wrap up discussion that you need to be sure that I've got everything I need for context.

By example, we just issued opinion shortly ago, and in the very last point at the analysis we realized there was a critical document missing. It obviously slowed everything down. We had promised to get that opinion out by a certain point. We would have met our obligation but for the fact that there was an absolutely critical document that had not been offered, nor had there been any explanation offered to us as to why it wasn't there. It turned out not [1807] to be there, but the parties had dodged the issue, particularly one side, knowing full well that that was a killer. It is a killer. It was a killer.

Dodging issues or taking something out of context is not going to get us to where we need to go with the kind of speed that I would like to resolve this case. This is obviously a very complicated fact pattern and at the very same time a very simple legal issue. Some would call it unusual, unique. The word extraordinary has been used a great deal during the course of the trial.

It is without question, and I think the attorneys all essentially acknowledged it, although some tried to deny

it. There is a theme of trying to deny it, but there is a unique fact pattern here. Some said it fits in and I think even in closing said this is just a normal, old fashioned criminal case in a sense. It's not.

We've got a lot of very, very expert and far more expert that I am criminal practitioners who have been part of this case, and the theme that I got from it is that there are big differences here. Now, are they big enough to take it out of the criminal context of the Duboc proceeding before Judge Paul? I'm not entirely sure of that answer yet, and that's one of the things I'm going to really look at hard, but there is no question that this is a unique fact pattern. My experience as a prosecutor tells me that. It's [1808] been a lot of years ago that I was a prosecutor, but this kind of thing has not changed that much. It's just not a standard case.

As you'll hear in a moment, I'll talk about two cases that we've identified that we want you to deal with, and there may be others. They are much more typical fact patterns, although some of the decision language in those cases does have a bearing on what we're doing.

One of the things that I've had to wrestle with a great deal since day one in this case is the natural and normal deference that any Trial Judge gives to another Trial Judge. Very difficult issues are raised here. I read a lot of Judge Paul's decision material. He has the reputation of a very honorable and fine Judge, and there is a presumption certainly if not in a legal sense then certainly in sort of a collegial sense that what he says and does is to be taken at its face value.

The issue that distinguishes this case potentially is, of course, that there was a point in time where this issue that we have before us here on the alleged contract was specifically carved out, and there was discussion in front of Judge Paul and I think a writing by Judge Paul – yes, I know a writing by Judge Paul – that says, you know, take it to the Court of Federal Claims if you want to. There is the problem that then there is a dismissal with [1809] prejudice and some very broad language in that dismissal with prejudice of anything flowing from this case. I've paraphrased it, but that's essentially what it says.

Those two things taken in counterpoint to each other raise the issue as to, you know, how to deal with some of the previous proceedings. If Judge Paul was right the first time when he said take it to the Court of Federal Claims, then we have a jurisdictional issue obviously. We have jurisdiction to deal with it.

Those particular remarks, the various Orders that he issued, need to be examined by me much more carefully than I have today to see their effect. I am convinced that no other proceeding and no other presiding official has had the opportunity that I've had here to explore this issue as fully as I've had the opportunity and with a focus deliberately on that issue. I think that is important.

There are a number of levels on which I will issue a decision. Obviously there will be a winner or loser or maybe a half winner or half loser. That's a possibility, as you'll see by some of my questions later. I will also make specific findings on the credibility of the various witnesses who appeared in front of me.

One of the things that is so clear here is there is so much stuff – stuff for lack of a better word – that is flying around in satellite form to the main issues in [1810] this case. There are so many people with independent agendas, so many people with personal egos, so many people with reputations that they feel have been challenged by this set of circumstances. What I have to do is carve all that off and come up with an answer on the alleged contract.

There is no doubt in my mind as I've sat through these proceedings that my decision to deny the earlier two motions was correct and that Mr. Bailey very clearly deserved his day in Court. Whether he'll win or lose, he deserved his day in Court, and I think we have offered that to him as a result of this trial.

A dispositive motion would simply not, in my opinion, have been the way to deal with the case based on the fairness that's required and the duties that are assigned to me as a Judge of the Court of Federal Claims. That doesn't mean that we don't look at some of the prior proceedings, particularly Judge Paul's, to see what, if any, preclusive effect any piece or portion or particular writings or hearings should be given greater weight or not.

During the earlier motion practice it was really very difficult for me, and that's what was troubling me in that motion practice, to judge how all of these ancillary proceedings were related. They were thrown around in different pieces and forms and out of context. Everybody obviously chose what they liked best.

[1811] I really did not understand during the motion practice time how all of this was interrelated. I had some

idea, but I think I've got a much better understanding of that now, and I think I can come to much better conclusions as to the weight.

One of the issues that we talked about in terms of the admissibility of documents is obviously to what extent a non-final set of proceedings in the Florida Star Bar process should be introduced, and certainly if there's a final decision, Mr. Belkin, we expect that you will get it to us very quickly. I suspect you will do that at that time in compliance with that request to you.

The use of those bar proceedings for impeachment purposes for particular witnesses was appropriate, and we had certainly used it for that. The question is the findings that have been made this far by interim officers, as I ruled during the course of the trial, I felt were not appropriate for our use at this point.

Similarly, the material that was offered by the parties during the course of the motion practice and dispositive motion practice on the issue of authority to contract was woefully incomplete and extremely confusing. There were a lot of things thrown around – normal procurement authority, which I don't know that it applies, the relationship between the U.S. Attorney's Office and [1812] particularly the U.S. Attorney or the AUSAs with respect to their authority versus Washington authority of the Department of Justice. The relationships there certainly I think I understand a little bit better now and did not fully comprehend at that time, which was part of my reluctance again to rule on this case in a dispositive motion format.

There is probably nothing surprising in my telling you that both parties need to address the very serious issues of credibility raised with respect to a number of the witnesses. It must be a slightly different world than the one I live in for major criminal practitioners, but they all seem to be saying things about each other and going back and forth.

I do remember some of this certainly from my prosecutor days, although my prosecutor days were at the much more mundane state level where generally we got rather more routine cases. I was involved in a number of organized crime cases where we got some of this going on, but this is a different world. There really isn't a lot of harmony that we've heard between all of these practitioners. Credibility is a tremendously important issue, and bias, which is, in my view, the next step up, so to speak, from credibility.

We often are asked to assess the credibility of witnesses in the practice that we're involved in; even of expert witnesses. Did they do their homework? Did they put [1813] garbage into the computer and, therefore, get garbage out? What we've got here is flat out bias, real dislikes, and that's probably too mild a term, between various people testifying. Therefore, without any question, there are real issues on that subject.

I will say to you that one of the things that I found remarkable, and please don't take away any comment about how I will rule on the case ultimately because that's not it, but it is with respect to the issue of bias that I say this. I found the only person who testified with any lawyer-like demeanor was Mr. Bailey.

That doesn't mean he's got a winner here, but it was remarkable how each of the other key major criminal practitioners who got up here, and I'm talking about the private practitioners now and some of the public ones too, actually – I should revise that – used adjectives, used phrases, used passion, got pretty agitated as they were testifying.

Mr. Bailey remained calm, gave his version of the story, and that's one of the things that is clearly working through my mind at this point and is clearly a problem when you get witnesses who cannot, especially lawyer witnesses. I mean these people are professionals. They're trial courtroom lawyers, and they couldn't do what I'm sure each of them told their clients to do, which is to remain calm, [1814] to appear absolutely objective. There were a lot of instances in which that wasn't the case. We have to deal with that.

With respect to forfeitable assets, I think there is a question here as to whether or not the Biochem Pharma stock arguably was not forfeiture as a product of a legal Canadian drug activity or for some other reason. There certainly are questions related to the timing of the forfeiture and whether by delaying the forfeiture in the case of the Biochem Pharma stock that took it outside of the forfeitable assets.

There seems to be a lot of testimony that this was in the forfeitable asset estate. The question is how that was handled. The U.S. Attorney's Office took out of the forfeitable asset estate properties on behalf of – on behalf of is probably a bad word, but that ultimately were going to stay with both Robin and Raymond Duboc, so they had

the authority apparently, or so they believed, to do that. Why would the Biochem Pharma stock not also be in that?

If in fact the theory is that all of Claude Duboc's assets, because of his major drug activity and because of the length of his activity, were to be included in the forfeited estate then why is it different for the Biochem Pharma stock versus the Raymond Duboc and Robin Duboc properties?

[1815] Similarly, I don't think there is a lot of particularly probative value to the fact that the Japanese stocks and the Biochem Pharma stock were handled differently. If the Japanese stocks, and they never were, were not carved out of the forfeited estate then clearly they would be sold and returned to the authorities. That's what was intended with that stock. It appears that there's some question at least whether something different was intended with respect to the Biochem Pharma stock. Since certain assets were carved out, why not this one?

I think that's a very, very difficult question in this case, and I don't know the answer, frankly. Consistency. We're back to that. Not one that you mentioned, Mr. Horwitz, but another example I think of the inconsistencies in this case that need to be addressed in the final opinion.

That, of course, ties into the question of whether or not the government possessed legal title at any point, and I think the testimony is relatively clear, frankly, that they are arguing that they did not and that in fact they would have had to go through a forfeiture proceeding, which they ultimately did in front of Judge Paul, to include it in

that forfeitable asset estate. It was, however, done well after the fact. It was never done with the Raymond Duboc and Robin Duboc properties, and again that isn't quite a [1816] match and another one of the potential inconsistencies.

I do want you to address what the substitute assets concept has to do with this case and how it plays into the case and also whether or not, and I think I may have said this already, you can delay the forfeiture assets to allow for the maintenance and liquidation of other drug assets and how that would work out.

From the liquidation efforts I want you to address whether or not it is theoretically possible for the government to contract to maintain and liquidate overseas assets, overseas drugs assets, with a third party having no relationship with the case. That would be true really for assets that are in a drug estate, forfeiture estate, or assets in some way outside of that. I'm not sure.

Could the U.S. Attorney's Office contract for services of some sort with an attorney? In theory, I think the answer has to be yes. It's not done very often, and obviously the arrangement that was made here with Biochem Pharma stock and the maintenance of the French properties is not done very often either so that raises some serious issues.

Take a look at the plea agreement. It's obviously an important document in this case. What is interesting about it, and it will become even more clear why I'm so concerned about this when we talk about a couple of the [1817] cases that I want to address. The plea agreement didn't mention the Biochem Pharma stock.

Prior to the plea agreement, the stock was transferred to Mr. Bailey. The stock was left with Mr. Bailey after the plea agreement, during the plea agreement, to use and to maintain and liquidate the French properties. The question obviously raised is did the conduct of the parties, including Judge Paul here and the U.S. Attorney and the AUSAs as the U.S. Attorney singular and the AUSA as plural, did their conduct indicate that they really didn't intend to upset the earlier agreement with how to use the Biochem Pharma stock, whether trust or other contract or anything else?

The agreement alleged to be a contract was in place before the plea, after the plea and really didn't come unglued until a lot of other things happened. The timing is an issue that you need to deal with. If in fact there was a contract in place before the plea agreement and for some time thereafter, which subsequently the actions of the Court in the Northern District of Florida caused the government not to be able to perform, does that mean Mr. Bailey gets damages? We haven't really talked about that a whole lot. It wasn't really raised by the parties, but is I think an issue that I would like you to address.

This was an unprecedented arrangement apparently. [1818] Many of the witnesses have, as I indicated earlier, testified to that effect, and I'm interested in hearing from the government in this instance whether they acknowledge that it is and was an "unprecedented", extraordinary, whatever word you want to use, arrangement.

With respect to the alleged contract, very specific questions starting with can there be an express contract as alleged in Count I of the complaint when the alleged

contract is an oral contract, or is a writing required for an express contract? Compare the express contract in this regard to an implied contract as alleged in Count II of the complaint, which is generally manifested by the conduct of the parties.

The meeting of the minds question raised in closing argument by Mr. Belkin is a serious, serious issue. Many of the witnesses seem to have a different view as to what the arrangements were between Mr. Bailey and the government. The question is does this indicate that there was no meeting of the minds, which is, of course, required for a formation of the contract?

The witnesses stack up in different ways, depending on which side you're on. Mr. Bailey is probably not alone in his recollection of the events based on the testimony, but one of the witnesses is a government witness, Mr. Kirwin, who I found thus far, and I'm going to go back [1819] and read it, and obviously everything I'm saying here today is a preliminary reaction that could be revised once I go back and really, really pull this testimony and the documents apart.

I found Mr. Kirwin, of all of the Assistant U.S. Attorneys, to be the most credible, which makes him a vital player in this multi-action play. He was not comfortable on the stand, but I felt that he was trying to be forthright and trying to be honest about what he said. He didn't like where he was. You could see that. He was not enjoying this opportunity to testify, but he appeared to me to be very, very straightforward.

Some of the others, frankly, I am struggling with. Where I will come out at the end of the day on the others

I don't know, but my initial reactions, and these are initial reactions, just like it's an initial reaction to Mr. Bailey that I described earlier. My initial gut reactions, and I've been doing this for a long time, were that Mr. Kirwin was in fact the one who was trying to be most forthright amongst a lot of other witnesses. Again, I took copious notes with regard to demeanor, credibility, reactions, because it becomes so important ultimately in this trial. I will go back and review those notes.

If we don't have a meeting of the minds, what we could have on our hands is, you know, something that no one [1820] is really lying, no one is really making up post rationale concepts, but that you had a bunch of meetings and a bunch of sessions in which everybody simply walked out of the room with different understandings. That, as we know, in daily life does happen. The question is is that what happened here?

There's a lot of room here for potential for not necessarily talking about the same thing because what we have going on to some extent is the question of a fee, a traditional fee for the services for representing Claude Duboc as a criminal defense attorney. We have fees for repatriation of the assets, and we have this other question of the body of funds, which happens to be stock in this case, that was transferred to Mr. Bailey by the government with everybody's knowledge in the governmental institution. How does that play into it?

It would not be impossible, I think, for people to have walked out with a different understanding. This was unique. It was extraordinary. Nobody quite knew what to do with it, and there were lots of motives in here; the

government potentially to maximize the assets in a way that they don't traditionally do.

Traditionally this gets turned over to the Marshals, and if it's contraband they burn it. If it's assets they sell it. I can remember in my old days as an [1821] intern in the U.S. Attorney's Office watching big, big bonfires actually particularly of pornographic material, but they normally and traditionally dispose of forfeited assets.

Everybody was kind of trying to cut some kind of a deal here. Everybody had an idea of why they wanted to cut their deal. The question is did they all understand each other? It is a serious issue in this case. It's one that I ask you to pay particular attention to and to be sure that you give me the best you've got on this issue.

You can give me a little more understanding of why or if the Christina case has a bearing in this. Don't spend a lot of time on that one.

On the authority issue, from a legal perspective what I want you to do is to clarify the statutes, regulations, manuals, what each of these say about the authority to enter into this sort of contract. Don't come back to me and tell me it's a traditional procurement contract. It's not.

I am not exactly sure, Mr. Belkin, why you've given me that normal procurement authority. This just isn't it as I see it at this point. Maybe I'm wrong, but I don't see it, and I don't think anybody in the U.S. Attorney's Office saw it that way. There is no one from the witnesses out of the U.S. Attorney's Office or, for that matter, from main Justice who testified that this had to fit into the [1822]

level authority delegations commensurate with warrants to sign particular levels of expenditure. No one talked about that.

We all know that there are for traditional government procurement warrant levels above which individuals can't sign. It wasn't talked about contemporaneous to the events, or at least not in any testimony that I heard, and it wasn't talked about in fact by the witnesses who were trying to bolster their arguments at the end of the day here at this trial.

You need to address the question of the authority of the U.S. Attorney and then the AUSAs because I think Mr. Miller testified that he had the full authority to decide on which assets could be forfeited and which assets to in fact not forfeit for various reasons, whatever they might be; whether for eternity, as in the case of Raymond Duboc and Robin Duboc assets, or whether, as he testified, temporarily for use and maintenance in the French properties as he believed he was doing or he testified he believed, and I'm not sure what he believed at this point. He testified that that was the arrangement he made with Mr. Bailey.

There are several cases that talk in and around this subject matter; two in particular that need some attention. We haven't really had much discussion of these. I read them very carefully. Particular parts ring out to [1823] me. I think most are distinguishable again because of the unique situation that we've got here, but they're certainly sort of in the area and should be dealt with.

The first one is the Sadeghi case. I'm not sure I'm saying it properly, but it is Sharom Amir Sadeghi, S-A-

D-E-G-H-I, v. United States, 46 FedCl 660. It's a May, 2000, case. That case raises some issues in which the plaintiff argued that there was an oral agreement which included an implied promise by the government to protect the plaintiff from retaliation from a foreign government if he cooperated with the U.S. Government.

The U.S. Government ultimately denied any obligation to protect him, and there was a lot of talk in that case about administering the criminal justice system was at the heart of the sovereign action and that a breach of contract arising out of a criminal justice system does not ordinarily give rise to an action under the Tucker Act.

The Court found in Sadeghi that the alleged promise to protect the plaintiff was part of a larger plea agreement and that the plea agreement was a sovereign act and found no specific authority and no specific language spelling out the liability of the government. Plaintiff's complaint was dismissed.

The obvious difference here is that this is the criminal defendant himself who is making this claim, so that [1824] places him much more clearly in the jurisdiction of the sentencing Judge. Also, there was no outside attorney, person, whatever, who's alleging the contract at issue so it is quite different, but it is something that has some language that has a bearing.

The Sadeghi case relied very, very heavily on an old Court of Claims case, Kania v. United States, K-A-N-I-A, 650 F2d 264, a May, 1981, case. That case also I believe is distinguishable, but it also had language in it and talks about the authority question that I think needs to be dealt with.

Again we're talking about a criminal defendant and not an outside person, but the language in Kania surprisingly, because Sadeghi relies on it so heavily, actually says by the same line of reasoning we would deem it possible to make a binding contract subject to Tucker Act jurisdiction creating liability for a breach of a plea bargaining agreement or one to grant immunity for giving testimony or to protect a witness.

What Kania says is this kind of deal is not completely out of the realm of possibility. They didn't find it in the particular case and the particular facts that they had in front of them, but certainly didn't shut the door.

The Sadeghi case, as all of you know, is not [1825] binding on me. The Kania case is a more difficult question, and Kania I think has a somewhat different result from Sadeghi. I would not want to ignore the Sadeghi case. I try to give careful consideration to the decisions of my colleagues on the Court, but, as you know, technically speaking they are not binding on my decisions.

In that regard, I would ask you to also, and we will certainly – I guarantee it – look for other cases, and this is our preliminary kind of view of this, that have or talk about fact patterns that are relevant to what we have before us here and language in those cases that may shed some light.

Because of the uniqueness of this case, because of the issues that we've got, I would ask that in your search for those other cases that you not confine yourself to binding precedent, but in fact do a broad search of federal law so that we can look for any guidance that might be out

there. I suspect there's not a lot, but what there is we should probably all look at.

On the questions of stock depreciation and appreciation, if all the drug assets were forfeited except for the Biochem Pharma stock and that stock then goes down in value, would Mr. Bailey have exposure for prior out-of-pocket expenditures from the line of credit secured by the Biochem Pharma stock at Credit Suisse and for his unpaid [1827] fees?

The government seems to acknowledge that they told Mr. Bailey that the Biochem Pharma stock was all that he was going to have available to him. Is it reasonable to conclude that if you have the risk of the stock going down in value, which apparently he clearly had, and the risk of not being able to take any fees or expenses out of what he did, which is not generally the intent of even U.S. Attorney offices when they work with someone, or of Courts, if he had those risks why wouldn't he also have the benefit of the bargain of the stock going up?

His version of which portion of the Biochem Pharma stock proceeds had to be accounted for, what had to technically potentially be returned up to the figure that he testified to, is something that you all need to address. There are again some major inconsistencies in how this all plays out and fits together. It is not unreasonable to think if you have risk downward that you have risk upward. Not, it's also not impossible to cut a deal that doesn't give you that benefit, and that's, of course, what we're all about.

Thinking about it, in that regard is the rise and fall of the Biochem Pharma stock really any different from the

rise and fall of the value of other stocks, such as the Japanese stocks that we've had some testimony on, the homes, [1827] the boats, the boat slip, the pending sale? In this case, however, the Biochem Pharma stock was kind of segregated into a different category. Again, a lot of inconsistencies.

On the flip side, is it difficult to go from an understanding that approximately $5.8 million or $6 million or whatever the number is – we've heard lots of numbers – in stock was all that was available to pay the costs and expenses to the conclusion that the Plaintiff would enjoy any benefit of the stock appreciation?

If the stock depreciated, we heard testimony that there wouldn't have been anything else to cover his costs and expenses and fees. He apparently was not going to be authorized to take it out of the French assets or anything else. Either way you look at this, you could come up with a logical or illogical pattern, and you all need to address that.

A lot of the witnesses, almost all of the government witnesses, professed to be unaware of the stock appreciation or profit from stock provision in the arrangements between Mr. Bailey and the government. Both sides in that regard need to really lay out that testimony.

We've got the conflict of issue interest in here. Was it a conflict for Mr. Bailey to be Mr. Duboc's defense counsel and also to cut this other contractual deal that he's alleged he had with the government? In one of my [1828] earlier opinions obviously I raised the issue. The issue still troubles me, but maybe less after the trial than it did before. Nonetheless, you need to address those issues.

We know that criminal defense lawyers, in fact all attorneys or most attorneys – I guess there are some exceptions – are not so altruistic as to want to do representation or work without getting some benefit of the bargain, and so clearly the question arises of why is it different from just a large fee in any other case?

We've heard large numbers. These were large fees. These were going to be large fees. Everybody acknowledged they were going to be large fees. They were talking about six or seven figure fees. I think Mr. Shapiro was the only one who was talking seven figures, but it could have been six figures. There were a lot who didn't testify as to numbers. Why is it so different? Was it a fee arrangement and nothing else?

The transfer of the Biochem Pharma stock to Mr. Bailey was clearly a government act. It also clearly, at least on paper or by the absence of paper, was done without reserving any explicit language of a trust or other limiting language, other conditions under which Mr. Bailey would deal with the Biochem Pharma stock. It's not there.

We have only testimony after the fact. We have only testimony after many years, or not so many, but a few [1829] years now of really, really bad relationships. People are very normal. People have trouble stripping out some of these emotions, and the question is without written documentation of what really the deal was we have to sort through the question of no limiting language. Maybe that's it. One of the cases that I mentioned to you does address that question of limiting language, but

probably not in a dispositive way for this case. The absence of limiting language is an important issue.

Similarly, the question of whether we're talking about one fee or two fees. If we're talking about one fee, it's a fee for anything that Mr. Bailey has done or would be doing in the course of any contact with the Duboc case. In the case of a two fee theory, it is a fee for his criminal representation and a fee for the work that he was doing in repatriation for the government as two distinct fees that should be viewed and dealt with and adjudicated separately and potentially adjudicated in two separately Courts, namely this Court and the Northern District of Florida District Court.

There is some confusion here, too, and some inconsistencies. We heard testimony that Mr. Bailey did not segregate his billing practices on these two things. We heard testimony that he simultaneously did the repatriation work and continued to have a relationship with Mr. Duboc. [1830] There are obviously memos in which he is still counseling Mr. Duboc prior to his release as attorney of record, but still counseling him, getting him medical attention, various and sundry things.

There's also a potentially confusing event in Judge Paul's rulings, which again obviously Mr. Bailey applied for and was granted, which were talking about a category of claimed "expenses", which were from the decision, related to the "upkeep and protection of Duboc's European holdings."

Again, is that an inconsistency because part of this was not dealt with? That phrase I think I cited – well, I know I cited it – in I think it's the second of my two

opinions. It troubled me then. It troubles me now and again needs to be addressed.

The fact that he was given the stock without condition apparently in writing at the time with no stated conditions as to how Mr. Bailey could manage the Biochem Pharma stock and in fact making him essentially personally liable for a lot of the expenses that were involved, although theoretically he could then dip back to the Biochem Pharma proceeds to cover those costs, the fact that he placed it in the Credit Suisse account, which account would not have accepted drug proceeds money.

I know when that all started because I was [1831] involved in the early days of getting the Swiss Government to take a look at these issues. They're very serious about it. It's not lightly dealt with, and yet everybody knew he was putting it into the Credit Suisse account. Nobody seemed to have a problem with it. This was certainly not done behind a dark curtain, and there were potentially understandings that this was now transferred to Mr. Bailey and was not part of the forfeited estate or else it would have potentially been a problem with Swiss law and with Credit Suisse. That's certainly an issue as well.

By the same token, we've talked about Judge Paul's role in this, the language that I cited you to in my second opinion. If Mr. Bailey's theory is correct and if the jurisdictional theories lie that this alleged contract has to be adjudicated in this Court, then in theory the question would be could Judge Paul even have awarded the fees for the work that is at issue in the case here.

Because of that language the question is raised does it makes sense for liquidation expenses to come from Judge Paul, but not the fees for liquidating which were incurred. I'm sorry. Let me start that one again because I don't want to get you confused here. I think my language may be confusing as I said it first. Does it make sense for liquidation expenses to come from Judge Paul, but not fees for the liquidator incurring those expenses.

[1832] Along with that, there needs to be an explanation, and I guess this one would have to come from the Plaintiff, as to why Mr. Bailey didn't seek either or both attorney's fees or liquidation fees from Judge Paul. It is sort of the same question.

Some of the testimony in this case makes it clear that Mr. Bailey believed he had gotten this stock with the responsibility to account for a certain minor portion of it really and that he went out and he used some of this money for some personal expenses. If he's correct, there's no problem with that. If there was a misunderstanding, that's all it is. If he knew he shouldn't have done that then it's a whole different story.

Those are among the types of issues that I'm wrestling with at this point. There will undoubtedly be more as I work my way through the trial testimony and through the exhibits, and there are undoubtedly others that either party needs to, should and wants to raise. My remarks are not exclusive, and I want you to understand that really clearly. I'm raising some of the issues that have jumped off the page to me during the course of the trial or even some before the trial, but this is not an all inclusive list by any means. In fact, it would be terribly

misleading to suggest that. I don't mean to suggest that by any stretch of the information.

[1833] In order to present your own views on what the issues are, you ought to do exactly that. Don't be confined by what I've said now. What I'm asking you to do, though, is not to be confined by the issues that I've just raised, but rather to include those in your discussions because they are issues that concern me and I believe need to be addressed.

Mr. Belkin, I don't understand your oral motion. That may very well be me just not getting it. Sometimes you need to explain it more clearly. Sometimes I'm not hearing it clearly. I'm not sure which it is. I don't fault you. I just need help. You're going to have to be a lot clearer on what that's all about.

I also think the damages calculations that were offered, although maybe crystal clear to you all, were not crystal clear to me and so please set it out very, very clearly. The complaints, in my experience, are probably not amongst the most helpful documents for ultimately deciding cases. They're very early in the case. They're intentionally vague often. The only document, in my opinion, in all of these things repeatedly we do as lawyers that's even less useful is the answer, but the complaints don't get you there, and this one doesn't, at least not for me.

The testimony has used lots and lots of numbers. [1834] I think I understood what you, Mr. Horwitz, used in your closing statement probably better than I had earlier, but just lay it out so that any idiot like me can figure it out.

We have got an issue to deal with, a mechanical issue; not a legal or a factual issue, but a mechanical issue, although it relates heavily to the context problem that I discussed earlier. We have scattered information taken from a variety of proceedings, and I'm not sure I've got enough to do the contextual analysis.

I'm not looking for baggage here. I'm not looking for volume. I'm not looking for tomes. I don't like extra paper. All that means is that I've got to read it. I do think I'm going to need transcripts of the proceedings before Judge Paul, and then I leave up to you what else we need to get.

On the issues of authority, on the issues of standard forfeiture practice or asset management, I do need the regulations/policy manuals that have been loosely referred to. I think honestly in this regard I have gotten odd portions. Very, very odd portions.

We still have that question, which I think you answered more fully, Mr. Belkin, but I only have one little piece of it with respect to the regulatory or manual information as to the date that it was relevant. From the information that you gave us the other day in Court, I took [1835] away that we probably need all of the above because it changed midstream in what we're doing.

It's not, in my opinion, only the day on which the deal was allegedly cut, but it's actually through the date that Mr. Bailey ultimately returned the assets because up until that point he's still managing some of these things. We need to complete the information that you offer to the Court on those issues.

I've asked, and I think, Mr. Horwitz, you were going to do, or were you going to do that with Mr. – I think it's probably more appropriate for someone to take the lead, but for you to give me a jointly reviewed document as to the Duboc docket sheet and its cross referencing to the exhibits that we have isolated in our exhibit books. I leave up to you – you're experienced attorneys – how you get that job done, but I do want it to be one that's been reviewed by both. I don't want later on for us to have a problem in this or any other regard.

We need to talk about the schedule and how it best serves the purposes of everyone, including the Court in this case, in terms of getting the post-trial briefing done and a decision made. As I indicated to you, for reasons of my own I don't want to protract this very far, but my idea of protracting and yours might be quite, quite different.

We've discussed briefly how this might impact some [1836] of the other proceedings, particularly the bar proceeding. My understanding from you all is that the final hearing is at the end of the month. I indicated to you I don't want it to become an issue to a motion for reconsideration. Certainly some of the findings I will make, if not the ultimate finding, but certainly some of the findings on credibility are going to be part of this package.

* * *

J.H.E. CONSULTANT GROUP
Denver – Colorado Springs – Vail

James H. Earle, Ph.D.
Certified Polygraph Examiner
(719) 264-9384

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Examinee: Francis Lee Bailey Jr.

Location: Boston, Massachusetts

Date: May 27, 2000

**Presenting Issue:** Allegations that Francis Lee Bailey Jr. misused funds from a trust of Biochem Pharma have been made against Mr. Bailey. Francis Lee Bailey Jr.'s, Attorney, Kenneth J. Fishman, requested that Mr. Bailey be given a polygraph examination to determine if the allegations against Mr. Bailey were true.

On May 27, 2000 Mr. Bailey met with the examiner and was interviewed concerning this matter. Mr. Bailey was furnished with a waiver form, which he read and executed releasing JHE Consultants of any liability, which may result from the polygraph examination. This executed release form is incorporated as part of the JHE Consultant Group Laboratory file in this case. Mr. Bailey told the examiner that he had never agreed to setting up a trust for the Biochem Pharma he had received from the United States Government at the direction of Greg R. Miller, Assistant United States Attorney. Mr. Bailey told the examiner that there had never been any trust or trust agreement between himself and Greg R. Assistant United States Attorney, concerning the stock of Biochem Pharma he had been given by the United States government. Mr.

Bailey told the examiner that the United States Government, as payment for his legal service to Claude Duboc, had transferred the stock to his personal account. Mr. Bailey agreed to verify his statement by taking a polygraph examination. A polygraph utilizing the Backster Zone Comparison Test Format including the following relevant questions was then constructed:

A. Did you agree with Greg Miller to set up a trust? No

B. Did you agree with Greg Miller to set up a trust with Biochem Pharma? No

**Findings:**

The in test Phase of the Forensic Physiological Detection of Deception assessment was conducted on the Axciton Computerized Polygraph System. This system conforms to the recognized standards and procedures of the American Polygraph Association. The test, consisting of 3 (three) polygraph charts, was evaluated utilizing the conventional numerical scoring system developed by the Department of Defense Polygraph Institute. Based on the above evaluation, it is the opinion of the examiner that the recorded responses to the relevant questions reflected truthful responses. It is the opinion of the examiner that Francis Lee Bailey Jr. responses were truthful.

**Pre Test:**

During the Pre Test, Francis Lee Bailey Jr. told the examiner he had received stock of Biochem Pharma in May 1994 from the United States Government as payment for legal services performed for Claude Duboc. Mr. Bailey

stated that Assistant United States Attorney, Greg R. Miller, had authorized this stock transfer. Mr. Bailey advised that at no time had he agreed to set up a trust for the Biochem Pharma stock. Mr. Bailey said that at no time was there any discussion between he and Greg R. Miller, Assistant United States Attorney of any trust arrangements for the Biochem Pharma stock. Mr. Bailey said he is living in the Boston, Massachusetts and Manalapan, Florida. Mr. Bailey told the examiner that he is a practicing attorney. Mr. Bailey said he had received a Law Degree degree from Boston University in 1960. When asked about his general health, Mr. Bailey told the examiner he had his left hand operated on for Dupartins Constrature, five weeks ago and was still under a doctor's care for the surgery. Mr. Bailey stated "I consider myself in good health and know of no medical reason that would effect the examination". When asked if he had taken any medication in the last 24 hours, Mr. Bailey responded none, other than two Advil last night. Mr. Bailey told the examiner he had a scotch and soda and some wine at dinner last evening. Mr. Bailey said he had slept around four hours last night. Mr. Bailey told the examiner he had no problem hearing and understanding the examiner. Mr. Bailey told the examiner he had no vision problems. Mr. Bailey was born on June 10, 1933 in Waltham, Massachusetts. It is noted that the examination began at 10:05 AM and was completed at 12:17 PM.

**Post Test:**

During the Post Test Phase, Mr. Bailey was informed of the examiner's opinion concerning the truthfulness of his

responses to the above relevant questions. The examination was completed at this time.

Respectfully,

/s/ James H. Earle
James H. Earle, Ph.D.
Certified Polygraph Examiner

**SLATTERY ASSOCIATES, INC.**

**POLYGRAPH**

[Names Omitted In Printing]

[Graph Omitted In Printing]

**FEDERAL & STATE**
**COURT QUALIFIED**

REPORT OF POLYGRAPH EXAMINATION

OF

JOAQUIN SERBANDO FUSTER

RE

ALLEGED WITNESS
INVESTIGATIVE ISSUES

SLATTERY ASSOCIATES, INC.
FILE NUMBER 96-0112 (S)

EXAMINED ON

MAY 14th, 1996

BY

GEORGE B. SLATTERY

REPORT DATE

MAY 16th, 1996

8525 Northwest 53rd Terrace, Savannah Building, Suite 100, Miami, Florida 33166
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## I

## QUALIFICATIONS OF THE EXAMINER

**GEORGE B. SLATTERY**
(FPA Certified Polygraphist Number 116)

The examiner has been a practicing polygraphist since 1962, and has conducted approximately 15,000 polygraph examinations regarding criminal and civil issues, including major crimes testing for the Criminal Justice System. The examiner has qualified as an expert witness on numerous occasions in state and federal court, and was the polygraphist in *United States v. Piccinonna* [885 F2d 1539 (11th Cir. 1989)], *United States v. Matthews* (case number 94-6020-CR-Ungaro Benages), *State of Florida vs. Kassidy* [495 So. 2d 907 (3rd. DCA 1986)], *United States v. O'Neill* (case number 93-8095-CR-Ungaro Benages), *United States v. Duncan* (case number 94-87-CR-ORL-22) *United States v. Johnson, Cardoen, et al.* (case number 93-241-CR-Highsmith), *United States v. Johnie W. Osborne, et al.* (Middle District of Florida, Tampa Division, case

number 94-186-CR-T-24C), and *State of Florida vs. Jacques Georges* (11th Cir. case number 95-24356).

After receiving a Certificate Of Completion from The Backster School of Lie Detection, the examiner became a Life Member of The Florida Polygraph Association and served on the Board of Directors for 10 consecutive years; twice as President, three times as Chairman of The Board, and also served as Vice President Public Sector and Vice President Private Sector. The examiner has conducted numerous training seminars for that association on topics including: chart interpretation, numerical scoring of charts, ethics, control question formulation, the proper application of The Backster Zone Comparison Technique and the presentation of polygraph evidence in court. He has been designated as a Certified Polygraphist (CP) by the Florida Polygraph Association.

The examiner is a Full Member of the American Polygraph Association, the Florida Polygraph Association, and the National Polygraph Association. He has been designated as a Board Certified Forensic Examiner (BCFE) by the American Board of Forensic Examiners, a Certified Fraud Examiner (CFE) by the Association of Certified Fraud Examiners, and a Certified Protection Professional (CPP) by the American Society For Industrial Security.

The examiner has attended and instructed at American Polygraph Association National Seminars between 1980 and 1994 in: Vancouver, British Columbia; Reno, Nevada; Atlanta, Georgia; Jeffersonville, Vermont; Orlando and Miami Beach, Florida; and Nashville, Tennessee. He has also served as Seminar Chairman, and presented to that

association the documents he authored entitled "Effective Polygraph Utilization," "The Polygraph In Court," and "EPPA Polygraph Examinations."

Mr. Slattery has also been designated as a Distinguished Fellow of the Academy of Certified Polygraphists, and became a Senior Instructor at the National Polygraph Institute after receiving a Master of Polygraphy from that institute.

Additional qualifications, references, or a Curriculum Vitae will be provided upon request.

## II

## SUBJECT INFORMATION

Subject (examinee) information including full name, and stated: aliases, nicknames, birth data, residence address, physical description, basic medical or psychological history, education, and employment data are retained in the Slattery Associates, Inc. files and copies of same can be made available to the examination sponsor upon request. If the Subject has no positive photo identification at the time of the examination, a Polaroid photo is taken and retained in our file.

## III

## PRE-TEST AND POST TEST RELEASES

Each Subject is requested to read and sign these releases confirming the voluntary nature of the examination. A Miranda Rights Warning is also utilized for stipulated examinations and for examinations conducted on behalf of any law enforcement agency or State Attorney's Office.

These forms are retained in our case files and copies of the same are available upon the sponsor's request.

## IV

## POLYGRAPH INSTRUMENT INFORMATION

The instrument used for the examination was manufactured by the Stoelting Company and utilizes at least four pens for simultaneous, permanent, visual recordings of the Subject's relative blood pressure, pulse, respiration, and galvanic skin reflex.

## V

## POLYGRAPH TECHNIQUE

The BACKSTER ZONE COMPARISON TECHNIQUE was utilized for the examination. The relevant test questions, only, and the Subject's responses are listed in Section VII of this report.

## VI

## QUESTION NUMBERING

Test questions are numbered in accordance with the Backster Zone Comparison Technique. The total number of questions asked during the instrumentation phase of the examination range from 10 to 14, but are not listed in that usual order. For example, in the exploratory series, the relevant questions are numbered 39, 43, 44, and 45. This does not reflect that a total of 45 questions have been asked. This numbering system was established for the sake of standardization and to allow the blind numerical scoring of charts relative to quality control.

## VII

## BASIC CASE INFORMATION

Case information for the polygraph examination of JOAQUIN SERBANDO FUSTER, age 54, was provided by KENNETH J. FISHMAN, Esquire. Sources of information included a copy of the February 2nd, 1996, testimony of GREGORY MILLER, EDWARD SHOHAT, and ROBERT SHAPIRO, as well as the February 2nd and February 3rd, 1996, testimony of F. LEE BAILEY in the Hearing on Government's Emergency Motion to Surrender Property, in the case of UNITED STATES v. DUBOC. This examiner was also provided with a copy of Mr. Fuster's March 16th, 1996, sworn Affidavit for the purpose of this examination.

The examiner was advised that the issues under investigation are whether or not Mr. Fuster was present with Attorney F. Lee Bailey during a conference in the chambers of Judge Maurice Paul on May 17th, 1994, and whether or not he heard anyone at that conference mention the word "trust."

## VIII

## SUBJECT'S VERSION OF THE INCIDENT

During the pretest interview JOAQUIN FUSTER's statements to this examiner were essentially the same as those contained in his Affidavit of March 16th, 1996, a copy of which was reviewed, initialed and dated by Mr. Fuster and this examiner. [See copy attached at the end of this report.]

Mr. Fuster said that he was present during that May 17th, 1994, conference in issue and was in Judge Paul's chambers for the entire time of that conference. He advised that at no time during that conference did he hear the word "trust" mentioned by anyone.

Mr. Fuster added that he is a trustee for his nephew, knows about trusts and would have been aware if a trust had ever been mentioned, especially relative to Mr. Bailey, during that meeting.

## IX

## THE POLYGRAPH EXAMINATIONS

The following relevant examination questions were asked of JOAQUIN FUSTER, and his responses to those questions are also listed below:

CHART I

39. Regarding your alleged presence throughout that meeting in Judge Paul's chambers on May 17th, 1994; do you intend to answer truthfully each question about that?

(A) Yes.

43. Did you lie when you swore you were present throughout that meeting in Judge Paul's chambers on May 17th, 1994?

(A) No.

44. At any time during that meeting in Judge Paul's chambers on May 17th, 1994, did you hear the word trust mentioned by anyone?

(A) No.

CHART II

The same relevant questions were asked and the Subject's responses were the same as those in Chart I, except that the order of the questions was reversed.

CHART III

The same relevant questions were asked and the Subject's responses were the same as those in Chart I.

CHART IV

The same relevant questions were asked and the Subject's responses were the same as those in Chart I.

X

RESULTS AND CONCLUSIONS

Based upon a careful analysis of JOAQUIN FUSTER's polygrams, it was the opinion of this examiner that there were no significant or consistent psycho-physiological reactions consistent with deception to the relevant questions and answers.

Therefore, it was the opinion of this examiner that Mr. Fuster did truthfully answer those questions.

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF PALM BEACH

Joaquin S. Fuster, being of full age and duly sworn according to law, based on personal knowledge and upon oath, deposes and says:

1. I reside and am domiciled in the state of Florida.

2. I am a licensed commercial pilot.

3. Attorney F. Lee Bailey has on many occasions over approximately the past 10 years hired me to fly his aircraft.

4. From April, 1994 through May 17, 1994, I flew at least eleven (11) trips for Mr. Bailey in connection with the *Duboc* case.

5. On one such trip, I was present on May 17, 1994, at a conference held in the chambers of Judge Paul. Present at this conference were the Judge, Mr. Bailey, Assistant United States Attorney Greg Miller, Assistant United States Attorney Tom Kirwin, Attorney Ed Shohat, D.E.A. Agent Carl Lilly and others including, for a short period of time, Claude Duboc.

6. After the Judge called the meeting to order, there was a brief exchange between Mr. Duboc and the Judge after which it was indicated that Mr. Duboc was no longer needed in chambers, and he was escorted from the room.

7. I recall that Attorney Shohat addressed the court concerning Japanese stock that he wanted transferred to

him, and indicated that he had written a letter to the court concerning this stock.

8. To the best of my memory Mr. Miller told the court that no further money should be transferred because $6,000,000.00 was being provided to Mr. Bailey and that was enough. He also stated that he had told Mr. Shohat that.

9. I recall that Mr. Bailey advised the Judge that he would submit an accounting to the court at "the end of the tunnel".

10. At no time during this meeting was there any mention of a trust or trust account in connection with the transfer of $6,000,000.00 to Mr. Bailey, nor was any statement made regarding any stock except the Japanese stock referred to above. Specifically, there was no mention of Biochem Pharma stock.

11. The formal part of the meeting in the Judge's chambers, to the best of my memory lasted at most ten minutes.

/s/ Joaquin S. Fuster
JOAQUIN S. FUSTER

Before me, the undersigned authority, on March 16, 1996, personally appeared Joaquin S. Fuster, who is personally known to me, and states that he had read the above and foregoing Affidavit and states that the contents thereof are true and correct to the best of his knowledge, information and belief.

/s/ Carolyn M. Gadigian
NOTARY PUBLIC

[SEAL] CAROLYN M. GADIGIAN
MY COMMISSION #CC 318158
EXPIRES: Sept. 18, 1997
Bonded [illegible] notary Public Underwriters

[Illegible] 5/14/96

[Illegible] 5/14/96

**AFFIDAVIT**

STATE OF FLORIDA

COUNTY OF DADE

George B. Slattery, being of full age and duly sworn according to law, based upon personal knowledge and upon oath, deposes and says:

1. I reside in the State of Florida. Both my residence and office are in Dade County, Florida.

2. I am an expert polygraph examiner, having been qualified as such in state and federal courts.

3. I have conducted more than 10,000 examinations since October of 1962, am a full member of the American Polygraph Association, National Polygraph Association and Florida Polygraph Association. I served as President; Board Chairman; Vice President, Private Sector; Vice President, Law Enforcement Sector, and am a Life Member of the Florida Polygraph Association.

4. I was the polygraph examiner in the matter of *United States v. Piccinonna* [885 F2d 1539 (11th Cir. 1989)].

5. On May 14, 1996, at the request of KENNETH FISHMAN, Esquire, I administered a polygraph examination to JOAQUIN S. FUSTER between the approximate times of 10:20 a.m. through 2:40 p.m. The purpose of said examination was to confirm or negate the veracity of Mr. Fuster's Affidavit of March 16, 1996, relative to his representation that he was present on May 17, 1994, at a conference held in the Chambers of Judge MAURICE PAUL, relative to defendant CLAUDE DUBOC. (See attached Fuster Affidavit.)

6. This examiner, utilizing the Backster Zone Comparison Technique, Exploratory Test, opined that Mr. Fuster truthfully answered the following relevant questions which were asked during the course of conducting four (4) separate polygraph charts.

39. Regarding your alleged presence throughout that meeting in Judge Paul's chambers on May 17, 1994; do you intend to answer truthfully each question about that? Answer: Yes

43. Did you lie when you swore you were present throughout that meeting in Judge Paul's chambers on May 17, 1994? Answer: No.

44. At any time during that meeting in Judge Paul's chambers on May 17, 1994, did you hear the word trust mentioned by anyone? Answer: No.

/s/ G. B. Slattery
GEORGE B. SLATTERY

Before me, the undersigned authority, on November 7, 1997, personally appeared George B. Slattery, who is personally known to me, and states that he had read the above and foregoing Affidavit and states that the contents thereof are true and correct to the best of his knowledge, information and belief.

/s/ Kelly D. Graham
NOTARY PUBLIC –
Kelly D. Graham

[SEAL] OFFICIAL NOTARY SEAL
KELLY D GRAHAM
COMMISSION NUMBER
CC505622
MY COMMISSION EXP.
OCT. 25, 1999